Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-282

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER,

Petitioner,

vs.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 9, 1997
Certiorari Granted November 20, 1997

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25. Opinion of the United States Court of Appeals for the Eleventh Circuit, *en banc*, Dated February 8, 1996 ..... App. 41a

US. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

CIVIL DOCKET FOR CASE # 92-CV-8010

Faragher, et al v. City of Boca Raton, et al. Assigned to Judge Shelby Highsmith Demand: $0,000 Lead Docket: None Dkt# in other court: None	Filed: 01/06/92 Jury Demand: Defendant Nature of Suit: 422 Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

BETH ANN FARAGHER plaintiff	William Robert Amlong [COR LD NTC] Amlong & Amlong 500 N.E. 4th Street 2nd Floor Fort Lauderdale, FL 33301-1154 954-462-1983
NANCY EWANCHEW plaintiff	William Robert Amlong (See above) [CORD LD NTC]
v.	
CITY OF BOCA RATON, a political subdivision of the State of Florida defendant	Peter Joseph Hurtgen [COR LD NTC] Cathy Mattson Stutin Below Address Terminated on 8/1/97

579-0346
[COR LD NTC]
Morgan Lewis & Bockius
First Union Financial
Center
200 S Biscayne Boulevard
Suite 5300
Miami, FL 33131-2339
305-579-0300

BILL TERRY
defendant

Peter Joseph Hurtgen
[term 10/21/92]
(See above)
[COR LD NTC]
Cathy Mattson Stutin
[term 10/21/92]
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DAVID SILVERMAN
defendant

Peter Joseph Hurtgen
(See above)
[COR LD NTC]

Cathy Mattson Stutin
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on 8/1/97
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Stuart Arthur Goldstein
305-670-2899
Penthouse I
[COR LD NTC]
9350 S. Dixie Highway
Miami, FL. 33156

RELEVANT DOCKET ENTRIES

1/6/92	1	COMPLAINT filed; FILING FEE $120.00 receipt #50323 TEB A-7 (msf) [Entry date 01/15/92]
3/16/92	12	MOTION by City of Boca Raton and Bill Terry to dismiss complaint and/or to strike [1-1] complaint (vr) [Entry date 03/25/92]
3/17/92	13	ANSWER to Complaint by Bill Terry (Attorneys Peter Joseph Hurtgen and Cathy Mattson Stutin), (vr) [Entry date 03/25/92]
3/30/92	18	PARTIAL ANSWER to Complaint by David Silverman (Attorney), (hr) [Entry date 04/06/92]
3/30/92	19	MOTION by David Silverman to dismiss complaint, to strike claims for punitive damages (hr) [Entry

date 04/06/92]

3/30/92	20	MEMORANDUM by David Silverman in support of [19-1] motion to dismiss complaint, [19-2] motion to strike claims for punitive damages (hr) [Entry date 04/06/92]
4/15/92	24	RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [19-1] motion to dismiss complaint, [19-2] motion to strike claims for punitive damages (mg) [Entry date 04/23/92]
4/24/92	27	RESPONSE by City of Boca Raton, Bill Terry in opposition to [24-1] motion response (mg) [Entry date 05/05/92]
4/30/92	29	REPLY by Beth Ann Faragher to response to [19-1], motion to dismiss complaint [19-2] motion to strike claims for punitive damages (mg) [Entry date 05/08/92]
8/13/92	38	ORDER granting [19-1] motion to dismiss complaint as to count I, Terry's and Silverman's motion to dismiss counts I granted, and count I, as it attempts to assert a cause of action against Terry and Silverman is dismissed with prejudice. Denied [19-2] City's motion to strike claim for punitive damages: City's motion to dismiss complaint as to counts II,

III, IV is granted and counts II, III and IV are dismissed. Terry's motion to dismiss counts VI and IX are dismissed without prejudice. Terry's and Silverman motions to dismiss counts VII and X are dismissed without prejudice. City's motion to dismiss counts XI and XII is granted (signed by Judge Shelby Highsmith on 8/13/92) CCAP (mg) [Entry date 08/18/92]

9/4/92	--	PROPOSED first amended complaint (mg) [Entry dated 09/10/92]
9/21/92	41	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in support of [19-2] motion to strike claims for punitive damages (mg) [Entry date 09/22/92]
9/21/92	43	ANSWER by City of Boca Raton, Bill Terry, David Silverman (Attorney Peter Joseph Hurtgen, Cathy Mattson Stutin) to amended complaint (mg) [Entry date 09/22/92]
9/23/92	44	ANSWER by David Silverman to amended complaint (mg) [Entry date 09/24/92]
10/22/92	52	MEMORANDUM by Beth Ann Faragher, Nancy Ewanchew in opposition to [19-2] motion to strike

		claims for punitive damages (mg) [Entry date 10/26/92]
10/27/92	53	ANSWER by Bill Terry to amended complaint; jury demand (mg) [Entry date 10/29/92]
11/2/92	54	REPLY by City of Boca Raton in opposition to [12-2] motion to strike [1-1] complaint (mg) [Entry date 11/05/92]
11/23/92	55	ORDER denying motion by City of Boca Raton to strike claim (signed by Judge Shelby Highsmith on 11/20/92) CCAP (mg) [Entry dated 11/25/92]
6/24/93	63	MOTION with memorandum in support by David Silverman in partial summary judgment as to Nancy Ewanchew (mg) [Entry date 06/25/93]
7/12/93	64	RESPONSE by Nancy Ewanchew to [63-1] motion for partial summary judgment as to Nancy Ewanchew (mg) [entry date 07/14/93]
7/23/93	65	MOTION by Beth Ann Faragher, Nancy Ewanchew for leave to file 2nd amended complaint (copy attached to motion) (hr) [Entry date 07/26/93]
7/30/93	66	MEMORANDUM by David

		Silverman in opposition to [65-1] motion for leave to file 2nd amended complaint (copy attached to motion) (hr) [Entry date 08/03/93]
8/2/93	67	RESPONSE by City of Boca Raton, David Silverman to [65-1] motion for leave to file 2nd Amended complaint (copy attached to motion) (hr) [Entry date 08/04/93]
8/9/93	68	NOTICE of withdrawal of motion for leave to leave amend by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 08/11/93]
8/9/'93	--	Deadline updated; withdrawing [65-1] motion for leave to file 2nd amended complaint (copy attached to motion) (mg) [Entry date 08/11/93]
8/12/93	70	ORDER denying [65-1] motion for leave to file 2nd amended complaint (copy attached to motion), granting [63-1] motion for partial summary judgment as to Nancy Ewanchew (signed by Judge Shelby Highsmith on 8/12/93) CCAP (mg) [Entry date 08/13/93]
8/13/93	71	ORDER, set status conference for 9:00 9/9/93 before Judge Shelby Highsmith, sta [sic] set State report due on 9/7/93 (signed by Judge

		Shelby Highsmith on 8/13/93) CCAP (mg) [Entry date 08/17/93]
8/31/93	74	Motion by David Silverman for sanctions against plaintiffs and/or attorneys (mg) [Entry date 09/02/93]
9/3/93	75	JOINT STATUS REPORT by Beth Ann Faragher, Nancy Ewanchew, City of Boca Raton, Bill Terry and David Silverman (mg) [Entry date 09/07/93]
9/8/93	76	Minute entry for proceeding held before Judge Shelby Highsmith on 9/9/93 denying [74-1] motion for sanctions against plaintiffs and/or attorneys - schedule announced (mg) [Entry date 09/10/93]
9/14/93	77	ORDER referring case to mediation. 15 days to appoint mediator (signed by Judge Shelby Highsmith on 9/14/93) CCAP (mg) [entry date 09/15/93]
9/14/93	78	ORDER setting Deadline for filing of all motions by 5/9/94 Calendar call set for 12:00 6/10/94 Pretrial Stipulation due on or before 5/23/94 Jury Trial set for 9:00 6/13/94 Memos of law due on or before 5/9/94 Discovery cutoff 4/25/94; (signed by Judge Shelby Highsmith on 9/14/93) CCAP (mg)

		[Entry date 09/15/93]
9/17/93	79	CONCISE Statement of undisputed material fact by City of Boca Raton (mg) [Entry date 09/21/93]
9/17/93	80	MOTION by City of Boca Raton, Bill Terry, David Silverman for partial summary judgment (mg) [Entry date 09/21/93]
9/17/93	81	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in support of [80-1] motion for partial summary judgment (mg) [Entry date 09/21/93]
9/17/93	82	NOTICE of filing deposition experts [sic] and affidavits (attached) by City of Boca Raton (mg) [Entry date 09/21/93]
10/6/93	84	Letter MOTION by Beth Ann Faragher, Nancy Ewanchew to appoint mediator (mg) [Entry date 10/12/93]
10/15/93	86	CLERK's appointment of Martin Soll as Mediator granting [84-1] motion to appoint Mediator (mg) [Entry date 10/20/93]
12/21/93	99	MOTION by City of Boca Raton, Bill Terry, David Silverman for partial summary judgment (mg) [Entry date 12/22/93]

12/21/93	100	NOTICE of filing deposition excerpts and affidavit (exhibits attached) by City of Boca Raton (mg) [Entry date 12/22/93]
12/21/93	101	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in support of [99-1] motion for partial summary judgment (mg) [Entry date 12/22/93]
12/21/93	102	CONCISE statement of undisputed material facts by City of Boca Raton (mg) [Entry date 12/22/93]
1/11/94	106	RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [99-1] motion for partial summary judgment (mg) [Entry date 01/12/94]
1/11/94	107	NOTICE of filing deposition excerpts in support of their response to defendant's motion for partial summary judgment by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 01/12/94]
1/14/94	111	NOTICE of filing deposition of Richard Bender, Beth A. Faragher, Nancy Ewanchew, and Kelly Evans (attached) by City of Boca Raton (mg) [Entry date 01/18/94]
1/14/94	112	REPLY by City of Boca Raton to response to [99-1] motion for partial summary judgment (mg) [Entry

		date 01/18/94]
1/14/94	113	NOTICE of filing additional deposition testimony pages (attached) by Beth Ann Faragher (mg) [Entry date 01/18/94]
2/9/94	115	REPORT of Mediation that: no agreement was reached (mg) [entry date 02/10/94]
3/21/94	116	DISCLOSURE OF EXPERT TESTIMONY by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 03/24/94]
3/28/94	117	NOTICE of supplemental authority by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 03/29/94]
3/29/94	118	Witness list by Bill Terry (mg) [Entry date 03/30/94]
3/30/94	119	Witness list by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 03/31/94]
3/30/94	120	Witness list by David Silverman (mg) [Entry date 03/31/94]
4/26/94	124	ORDER granting in part VI and VII, denying in part as to count I [99-1] motion for partial summary judgment. The motion is denied in all other respects (signed by Judge

Shelby Highsmith on 4/26/94) CCAP (mg) [Entry date 04/29/94]

4/29/94 125 MOTION by David Silverman for summary judgment (mg) [Entry date 05/03/94]

4/29/94 126 MEMORANDUM by David Silverman in support of [125-1] motion for summary judgment (mg) [Entry date 05/03/94]

4/29/94 127 Statement of material facts as to which there is no genuine issue to be tried by David Silverman (mg) [Entry date 05/03/94]

5/9/94 128 MOTION by City of Boca Raton for rule 35 mental examination of Nancy Ewanchew (mg) [Entry date 05/10/94]

5/23/94 133 NOTICE of Pendency of Motion by David Silverman re: [125-1] motion for summary judgment (mg) [Entry date 05/24/94]

5/31/94 137 ORDER granting [128-1] motion for rule 35 mental examination of Nancy Ewanchew (signed by Judge Shelby Highsmith on 5/27/94) CCAP (mg) [Entry date 06/06/94]

5/31/94 138 JOINT PRETRIAL STIPULATION by Beth Ann Faragher, Nancy Ewanchew, City of Boca Raton, Bill

Terry, David Silverman (mg) [Entry date 06/06/94]

6/2/94 139 RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [125-1] motion for summary judgment (exhibits attached) (mg) [Entry date 06/06/94]

6/6/94 140 Proposed Findings of Fact and Conclusions of Law by David Silverman (dr) [Entry date 06/07/94]

6/6/94 141 Proposed Findings of Fact and Conclusion of Law by City of Boca Raton (mg) [Entry date 06/08/94]

6/6/94 142 NOTICE OF FILING Proposed Findings of Fact and Conclusions of Law and final judgment by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/08/94]

6/6/94 143 PRE-TRIAL Proposed Findings of Fact and Conclusions of Law by Bill Terry (mg) [Entry date 06/08/94]

6/8/94 144 REQUEST for Production of originals at trial by City of Boca Raton (mg) [Entry date 06/09/94]

6/96/94 145 Certificate of service of proposed findings of fact and conclusions of law by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date

06/10/94]

6/10/94	146	Minute entry for proceeding held before Judge Shelby Highsmith on 6/10/94; CALENDAR CALL - case on stand by for second of trial period (mg) [Entry date 06/13/94]
6/10/94	--	Calendar call held (mg) [Entry date 06/13/94]
6/10/94	147	ORDER denying [125-1] motion for summary judgment as to counts II and III (signed by Judge Shelby Highsmith on 6/10/94) CCAP (mg) [Entry date 06/13/94]
6/10/94	148	DESIGNATION OF DEPOSITION EXCERPTS by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/13/94]
6/16/94	150	REQUEST for rule 35 report by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/20/94]
6/17/94	149	NOTICE OF FILING AMENDMENT to exhibit list by Beth Ann Faragher, Nancy Ewanchew (mg)
6/20/94	151	RESPONSE by City of Boca Raton in opposition to motion in limine (dr) [Entry date 06/22/94]
6/22/94	152	Minute entry for proceeding held before Judge Shelby Highsmith on

6/22/94: Non-JURI [sic] TRIAL DAY 2 - continued to 6/23/94 (mg) [Entry date 06/28/94]

6/22/94	--	Bench trial held (mg) [Entry date 06/28/94]
6/23/94	153	NOTICE of filing designation of deposition excerpts by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/28/94]
6/24/94	--	Bench trial held (mg) [Entry date 06/28/94]
6/24/95	155	Minute entry for proceeding held before Judge Shelby Highsmith on 6/23/94: NON-JURY TRIAL DAY 3 - continued to 6/24/94 (mg) [Entry date 06/28/94]
6/27/94	154	Minute entry for proceeding before Judge Shelby Highsmith on 6/24/94: NON-JURY TRIAL DAY 4 - continued to 6/27/94 (mg) [Entry date 06/28/94]
6/29/94	156	Proposed Findings of Fact and Conclusion of Law by David Silverman (mg) [Entry date 06/30/94]
6/29/94	157	POST trial memorandum by Bill Terry (mg) [Entry date 07/05/94]
6/30/94	158	ORDER, that Gail Nye shall appear

		on 7/22/94 at 10:00 to show cause for her failure to comply with subpoena (signed by Judge Shelby Highsmith on 6/30/94) CCAP (mg) [Entry date 07/05/94]
6/30/94	159	SUPPLEMENT by City of Boca Raton to: [141-1] proposed findings of fact (mg) [Entry date 07/05/94]
7/1/94	160	PRETRIAL MEMORANDUM by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 07/06/94]
7/13/94	161	NOTICE of filing plaintiff's exhibit list, defendant's exhibit list, plaintiff's exhibit 6K, L, and 22 (attached) filed by Law Clerk (mg) [Entry date 07/14/94]
7/21/94	--	Bench trial held (mg) [Entry date 08/01/94]
7/22/94	162	Minute entry for proceeding held before Judge Shelby Highsmith on 7/22/94; RULE show cause - for failure to comply with subpoena commanding to testify at trial - rule discharged (mg) [Entry date 07/25/94]
7/22/94	163	NOTICE of filing exhibits A, A1, B, C and D; admitted at the hearing on rule to show cause on 7/22/94 (attached) (mg) [Entry date

		07/25/94]
7/22/94	164	NOTICE of filing of deposition of Gaile [sic] Nye, Kelly Evans, Pat McGowan, Bill Terry, Richard Bender, David Silverman (attached) (mg) [Entry date 07/25/94]
7/22/94	165	JUDGMENT for Beth Ann Faragher, Nancy Ewanchew shall recover the summ [sic] of $10,000 in compensatory damages; $500.00 in punitive damages; $1.00 in nominal damages against Bill Terry (see order for more specification) (signed by Judge Shelby Highsmith on 7/22/94) CCAP/M (mg) [Entry date 07/25/94] [Edit date 08/18/94]
7/22/94	--	Case closed (mg) [Entry date 07/25/94]
7/22/94	166	FINDINGS OF FACT AND CONCLUSION OF LAW (signed by Judge Shelby Highsmith on 7/22/94) CCAP (mg) [Entry date 08/01/94]
7/22/94	167	Minute entry for proceeding held before Judge Shelby Highsmith on 7/21/94: BENCH TRIAL Day 1 - continued to 6/22/94 (mg) [Entry date 08/01/94]
7/29/94	168	Minute entry for proceeding held before Judge Shelby Highsmith on

		6/27/94: BENCH TRIAL DAY 5 - trial concluded (mg) [Entry date 08/01/94]
8/5/94	169	MOTION with memorandum in support by Beth Ann Faragher, Nancy Ewanchew for attorney fees and litigation expenses (mg) [Entry date 08/08/94]
8/8/94	170	NOTICE of intent to move for costs by City of Boca Raton (mg) [Entry date 08/09/94]
8/16/94	171	NOTICE OF APPEAL by Beth Ann Faragher, Nancy Ewanchew of [165-1] judgment order. EOD Date: 7/25/94; Filing Fee: $105.00; Receipt #: 640210; Copies to USCA and Counsel of Record. (Tb) [Entry date 08/18/94] [Edit date 08/18/94]
8/16/94	--	Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (tb) [Entry date 08/18/94]
8/22/94	172	VERIFIED MOTION by City of Boca Raton for attorneys fees (mg) [Entry date 08/23/94]
8/22/94	173	MEMORANDUM by City of Boca Raton in support of [173-1] motion to Tax Costs (mg) [Entry date

		08/23/94]
8/22/94	174	VERIFIED Motion with memorandum in support by Bill Terry for attorney fees, to Tax Costs against Ewanchew (mg) [Entry date 08/23/94]
8/22/94	175	MOTION by Beth Ann Faragher, Nancy Ewanchew for attorney fees (mg) [Entry date 08/23/94]
8/22/94	176	MEMORANDUM by Beth Ann Faragher, Nancy Ewanchew in support of [175-1] motion for attorneys fees (mg) [Entry date 08/23/94]
8/22/94	177	UNSWORN DECLARATION of Elizabeth du Fresne by Beth Ann Faragher, Nancy Ewanchew RE: [175-1] motion for attorney fees, and litigation expenses (mg) [Entry date 08/23/94]
8/22/94	178	UNSWORN DECLARATION of Thomas E. Scott by Beth Ann Faragher, Nancy Ewanchew RE: [175-1] motion for attorney fees, litigation expenses (mg) [Entry date 08/23/94]
8/22/94	179	UNSWORN DECLARATION of William R. Amlong by Beth Ann Faragher, Nancy Ewanchew Re: [175-1] motion for attorney fees

(mg) [Entry date 08/23/94]

8/26/94	181	NOTICE OF CROSS APPEAL by City of Boca Raton of [165-1] judgment order. EOD Date: 7/25/94; Filing Fee: FEE NOT PAID Copies to USCA and Counsel for Record. (cs) [Entry date 08/30/94] [Edit date 08/30/94]
8/29/94	--	NOTICE of Receipt of Transmittal Letter from USCA Re: [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps) [Entry date 09/09/94]
8/30/94	--	Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [181-1] appeal by City of Boca Raton (cs)
9/1/94	185	NOTICE of counsel's having conferred pursuant to rule 7.3 by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 09/02/94]
9/6/94	186	ORDER releasing trial exhibits to respective parties. (signed by Judge Shelby Highsmith on 9/22/94) CCAP (mg) [Entry date 09/08/94]
9/9/94	--	NOTICE of receipt of Transmittal Letter from USCA Re: [181-1] appeal by City of Boca Raton USCA NUMBER: 94-4878 (ps) [Entry date

09/22/94]

9/15/94	189	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in opposition to [175-1] motion for attorney fees (mg) [Entry date 09/16/94]
9/16/94	190	MEMORANDUM by David Silverman in opposition to [175-1] motion for attorneys fees and litigation expenses (mg) [Entry date 09/19/94]
9/16/94	191	RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [175-1] motion for attorney fees, [174-1] motion for attorney fees (mg) [Entry date 09/19/94]
9/23/94	192	MEMORANDUM by Bill Terry in opposition to verified [175-1] motion for attorney fees (mg) [Entry date 09/26/94]
9/26/94	193	REPLY memorandum of law by Beth Ann Faragher, Nancy Ewanchew in support of [175-1] motion for attorney fees and litigation expenses (mg) [Entry date 09/27/94] [Edit date 07/20/95]
9/26/94	194	UNSWORN DECLARATION of Bonnie M. Catalano by Beth Ann Faragher, Nancy Ewanchew in support of [175-1] motion for

attorney fees and litigation expenses (mg) [Entry date 09/27/94]

9/26/94 195 SUPPLEMENT by Beth Ann Faragher, Nancy Ewanchew to: [175-1] motion for attorney fees (mg) [Entry date 09/27/94]

9/26/94 196 SUPPLEMENTAL unsworn declaration of William R. Amlong by Beth Ann Faragher, Nancy Ewanchew to: [194-1] unsworn declaration (mg) [Entry date 09/27/94]

9/26/94 197 REPLY by City of Boca Raton to response to [172-1] motion for attorney fees (mg) [Entry date 09/27/94]

9/26/94 198 SUPPLEMENTAL by City of Boca Raton to: [172-1] motion for attorney fees (mg) [Entry date 09/27/94]

9/26/94 199 SUPPLEMENTAL AFFIDAVIT by City of Boca Raton to: [172-1] motion for attorney fees (mg) [Entry date 09/27/94]

10/3/94 200 RESPONSE by Beth Ann Faragher, Nancy Ewanchew in opposition to [199-1] supplement to (mg) [Entry date 10/04/94]

10/4/94 201 RESPONSE by City of Boca Raton to

[175-1] motion for attorney fees (dr) [Entry date 10/05/94]

10/4/94 201 REPLY by City of Boca Raton to response to [172-1] motion for attorney fees (dr) [Entry date 10/05/94]

10/12/94 202 DESIGNATION by Beth Ann Faragher, Nancy Ewanchew of additional parts to be included in record on appeal (ps) [Entry date 10/19/94]

10/31/94 203 TRANSCRIPT of trial excerpts (Volume 2) filed [181-1] appeal by City of Boca Raton for dates of 6/23/94, pages 1-98 (ps) [Entry date 11/02/94]

10/31/94 204 TRANSCRIPT of trial excerpts (Volume 3) filed [181-1] appeal by City of Boca Raton for dates of 6/23/94, pages 99-188 (ps) [Entry date 11/02/94]

11/2/94 -- Appeal Information Sheet re: [181-1] appeal by City of Boca Raton; Transcript of trial due 10/31/94; (ps)

11/8/94 205 MOTION by Beth Ann Faragher, Nancy Ewanchew to compel ordering of complete transcripts for appeal (mg) [Entry date 11/14/94]

11/23/94	206	RESPONSE by City of Boca Raton to [205-1] motion to compel ordering of complete transcripts for appeal (dr) [Entry date 11/25/94]
12/5/94	207	REPLY by Beth Ann Faragher, Nancy Ewanchew to response to [205-1] motion to compel ordering of complete transcripts for appeal (mg) [Entry date 12/08/94]
12/19/94	208	TRANSCRIPT of trial (partial) filed [181-1] appeal by City of Boca Raton for dates of 6/22/94, pages 1-81 (ps) [Entry date 12/20/94]
12/20/94	209	ORDER denying [205-1] motion to compel ordering of complete transcripts for appeal (signed by Judge Shelby Highsmith on 12/20/94) CCAP (mg) [Entry date 12/21/94]
1/5/95	210	ORDER setting motion hearing on [175-1] motion for attorney fees by Nancy Ewanchew, Beth Ann Faragher for 10:00 1/27/95, setting motion hearing on [174-1] motion for attorney fees by Bill Terry for 10:00 1/27/95, setting motion hearing on [174-2] motion to Tax Costs by Bill Terry for 10:00 1/27/95, setting motion hearing on [173-1] motion to Tax Costs by City of Boca Raton for 10:00 1/27/95, setting for hearing on [172-1]

		motion for attorney fees by City of Boca Raton for 10:00 1/27/95, setting motion hearing on [169-1] motion for attorney fees and litigation expenses by Nancy Ewanchew, Beth Ann Faragher for 10:00 1/27/95 (signed by Judge Shelby Highsmith on 1/5/95) CCAP (mg) [Entry date 01/10/95]
1/23/95	--	Certificate of readiness transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps)
1/23/95	--	Transmitted record on appeal consisting of 6 volumes of pleadings and 3 volumes of transcripts to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps)
2/2/95	212	ORDER setting motion hearing on [175-1] motion for attorney fees by Nancy Ewanchew, Beth Ann Faragher for 2:00 2/10/95, setting motion hearing on [174-1] motion for attorney fees by Bill Terry for 2:00 2/10/95 (signed by Magistrate Stephen T. Brown on 2/2/95) CCAP (mg) [Entry date 02/06/95]

2/21/95	--	Acknowledge of reciept by U.S.C.A. of: Certificate of readiness U.S.C.A. # 94-4878 (vp) [Entry date 02/23/95]
3/2/95	--	Certificate of readiness of 1st supplemental record on appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps)
3/2/95	--	Transmitted 1st supplemental record on appeal consisting of 1 volume of pleading to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps)
3/2/95	217	MEMORANDUM (copy) by City of Boca Raton, Bill Terry, David Silverman in support of [19-1] motion to dismiss complaint, [19-2] motion to strike claims for punitive damages, [12-1] motion to dismiss complaint, [12-2] motion to strike [1-1] complaint (mg) [Entry date 03/07/95]
3/2/95	218	MOTION by City of Boca Raton to supplement the record on appeal with document (Memorandum of Law in support of Defendant's

		Motion to Dismiss and/or Strike) (ps) [Entry date 03/07/95]
3/3/95	219	ORDER granting [218-1] motion to supplement the record on appeal with document (Memorandum of Law in Support of Defendant's Motion to Dismiss and/or Strike) (signed by Judge Shelby Highsmith on 3/3/95) CCAP (ps) [Entry date 03/07/95]
3/8/95	--	Certificate of readiness of 2nd Supplemental Record on Appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps) [Entry date 03/09/95]
3/8/95	--	Transmitted 2nd supplemental record on appeal consisting of 1 volume of pleadings to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps) [Entry date 03/09/95]
3/8/95	220	REPORT AND RECOMMENDATIONS of Magistrate Stephen T. Brown Recommends: Plaintiff's appropriate lodestar to be, after considering reasonable hourly rates and reasonable hours, the sum of $77,375.00. It is recommended that

the lodestar by reduced by 33% to reflect the mixed results obtained in this case. Finally it is recommended that Plaintiff be awarded expenses in the sum of $8,169.42, [175-1] motion for attorney fees, [174-1] motion for attorney fees, [174-2] motion to Tax Costs; Signature date: 3/7/95 Motion no longer referred Objections to R and R due by 3/18/95 CCAP (mg) [Entry date 03/10/95]

3/14/95	--	ACKNOWLEDGE of receipt by U.S.C.A. of: Certificate of Readiness of 1st supplemental record on appeal U.S.C.A. # 94-4878 (ps) [Entry date 03/16/95]
3/17/95	221	OBJECTION by City of Boca Raton to [220-1] report and recommendations (mg) [Entry date 03/20/95]
3/28/95	222	ORDER granting [175-1] motion for attorney fees, denying [174-1] motion for attorney fees, denying [174-2] motion to Tax Costs, denying [173-1] motion to Tax Costs, denying [172-1] motion for attorney fees, granting [169-1] motion for attorney fees and litigation expenses. Beth Ann Faragher shall recover $51,841.25 in attorney's fees from City of Boca Raton, Bill Terry and David Silverman, jointly

and severally. Plaintiffs shall recover $8,169.42 in costs with on-half of the total apportioned to each plaintiff. Costs award $4,084.71 shall be taxed against City of Boca Ration, Bill Terry, and David Silverman. (signed by Judge Shelby Highsmith on 3/27/95) CCAP (mg) [Entry date 03/31/95] [Edit date 03/31/95]

4/5/95	224	MOTION by City of Boca Raton for order allowing additional trial testimony, and to supplement record on appeal with transcript (vp) [Entry date 04/12/95]
4/7/95	223	TRANSCRIPT of excerpt from trial filed [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher for dates of 6/21/94, pages 1-22 (ps) [Entry date 04/11/95]
4/11/95	--	Certificate of readiness of 3rd Supplemental Record on Appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps)
4/11/95	--	Transmitted 3rd supplemental record on appeal consisting of 1 volume of transcripts to U.S. Court of Appeals (Miami Office): [181-1]

		appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps)
4/11/95	--	Supplemental Appeal Information Sheet re: [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher; Transcript of trial testimony due 5/10/95; (vp) [Entry date 04/13/95]
4/11/95	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: 2nd Supplemental Certificate of Readiness U.S.C.A. #94-4878 (ps) [Entry date 04/14/95]
4/12/95	225	NOTICE OF APPEAL by City of Boca Raton of [221-1] order. EOD Date: 3/31/95; Filing Fee: $105.00; Receipt #647754; Copies to USCA and Counsel of Record. (vp) [Entry date 04/13/95]
4/18/95	226	TRANSCRIPT of Direct Testimony of Beverly Barta (Volume 2) filed [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher for dates of 6/23/94, pages 1-6 (ps) [Entry date 04/21/95]
4/21/95	--	Appeal Information Sheet re: [225-1] appeal by City of Boca Raton. No transcript requested. Appeal Record due on 5/6/95 (vp) [Entry date 04/24/95]

4/24/95	227	ORDER granting [224-1] motion for order allowing additional trial testimony, granting [224-2] motion to supplement record on appeal with transcript (signed by Judge Shelby Highsmith on 4/24/95) CCAP (vp) [Entry date 05/02/95]
4/26/95	--	NOTICE of Receipt of Transmittal Letter from USCA Re: [225-1] appeal by City of Boca Raton USCA NUMBER: 95-4495 (ps) [Entry date 04/27/95]
5/1/95	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: 3rd Supplemental Certificate of Readiness U.S.C.A. #94-4878 (ps) [Entry date 05/05/95]
7/19/95	--	Certificate of readiness of 4th supplemental record on appeal transmitted to USCA Re: [181-1] by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps) [Entry date 07/20/95]
7/19/95	--	Transmitted 4th supplemental record on appeal consisting of 1 volume of transcript to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps) [Entry date 07/20/95]

7-20-95	--	Certificate of readiness transmitted to USCA Re: [225-1] appeal by City of Boca Raton USCA NUMBER: 95-4496 (ps)
7/20/95	--	Transmitted record on appeal consisting of 2 volumes of pleadings to U.S. Court of Appeals (Miami Office): [225-1] appeal by City of Boca Raton (USCA #95-4496) (ps)
7/28/95	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: Certificate of Readiness U.S.C.A. # 95-4496 (ps) [Entry date 08/08/95]
7/28/95	--	ACKNOWLEDGMENT of receipt of U.S.C.A. of: Certificate of Readiness of 4th supplemental record on appeal U.S.C.A. # 94-4878 (ps) [Entry date 08/08/95]
1/10/96	228	TRANSCRIPT of partial trial (Testimony of Beth Faragher, Ms. Bonner, and Ms. Buhr) filed [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy Ewanchew for dates of 6/22/94, pages 1-125 (ps) [Entry date 01/16/96]
1/18/96	--	Certificate of readiness of 5th supplemental record on appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy

		Ewanchew USCA NUMBER: 94-4878 (ps)
1/18/96	--	Transmitted 5th supplemental record on appeal consisting of 1 volume of transcripts to U.S. Court of Appeals (Atlanta): [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy Ewanchew (USCA #94-4878) (ps)
1/30/96	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: Certificate of Readiness of 5th supplemental record on appeal U.S.C.A. #94-4878 (ps) [Entry date 02/02/96]
5/21/97	231	MANDATE OF USCA (certified copy) vacating Opinion entered on February 8, 1996 [181-1] appeal, affirming judgement/order [171-1] appeal of the District Court. Mandate Issued Dated: 05/20/97; USCA Appeal # 94-4878; to Judge. (mlw) [Entry date 07/24/97]
6/13/97	229	MANDATE OF USCA (certified copy) Beth Ann Faragher & Nancy Ewanchew Re: [181]; City of Boca Raton Re: [171] affirming in part and reversing in part, judgment/order Mandate Issued Dated: 5/20/97; USCA Appeal; #: 94-4878; Copy to Judge. (Mlw) [Entry date 06/23/97] [Edit date 06/23/97]

6/13/97	230	Bill of Costs for City of Boca Raton against Nancy Ewanchew, Beth Ann Faragher in the amount of $103.68 (mlw) [Entry date 06/23/97]
6/13/97	--	Record on appeal returned from U.S. Court of Appeals: Consisting of fourteen volumes including five supplemental volumes. [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy Ewanchew USCA #: 94-4878 (mlw) [Entry date 06/23/97]
6/13/97	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: bill of cost and original record on appeal consisting of 14 volumes and 5 supplemental volumes. U.S.C.A. #94-4878 (mlw) [Entry date 07/22/97]
7/23/97	232	ORDER of dismissal from USCA (certified copy) dismissing [225-1] appeal as moot USCA #: 95-4496 USCA Order Date: 07/08/97 (df) [Entry date 07/29/97]
12/9/97	233	Transcript filed re: trial transcript day two Date: 6/22/94 Before Judge: Shelby Highsmith Volume No.: 1 of 1 Number of pages: 1-255 (ra)[Entry date 12/12/97]
12/12/97	234	Transcript filed re: Jury Trial Date: 6/23/94 Before Judge: Shelby Highsmith Volume No.: 2 Number

		of pages: 230 (vp) [Entry date 12/17/97]
12/12/97	235	Transcript filed re: Jury Trial Date: 6/24/94 Before Judge: Shelby Highsmith Volume No.: 3 Number of Pages 257 (vp) [Entry date 12/17/97]
12/12/97	236	Transcript filed re: Jury Trial Date: 6/21/94 Before Judge Shelby Highsmith Volume No.1 Number of pages: 165 (vp) [Entry date 12/17/97]
12/12/97	237	Transcript filed re: Jury Trial Date: 6/27/94 Before Judge: Shelby Highsmith Volume No. 4 Number of pages: 57 (vp) [Entry date 12/17/97]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO: 94-4878

RELEVANT DOCKET EVENTS

OPENING BRIEFS

3/31/95	Opening brief of appellant (BF)
3/31/95	Opening records of excerpts of appellant (BF)
5/1/95	Opening brief of X-appellant (BT)

5/9/95	Opening brief of X-appellant (COBR)
6/16/95	Opening brief of X-appellee (BF)
7/5/95	Opening reply brief of appellant (COBR)

EN BANC BRIEFS

8/5/96	En Banc brief of appellant
9/9/96	En Banc brief of appellee (COBR)
9/30/96	En Banc reply brief of appellant
8/5/96	En Banc Amicus Curiae brief (EEOC)
9/11/96	En Banc brief of appellee (BT)

EN BANC DOCKET ENTRIES

10/23/96	Filing supplemental authority of appellant/X-appellee

OTHER MOTIONS & ORDERS

2/26/96	Filing appellee's motion to vacate district court order awarding costs and attorney's fees against defendant City of Boca Raton and incorporated memo of law. /ols (submitted under case #95-4496)
3/4/96	Filing appellant's response to motion to vacate. /ols (submitted under case #95.4496)
5/13/96	Filing order that case be reheard en banc

	before all Active Judges GRANTED. The previous panel's opinion is VACATED. Senior Judge Dyer has elected to participate under Gen. Order N. 5. Slip P. 2005
7/8/97	Filing order: Appellant's "motion to vacate district order awarding costs and attorney's fees against City of Boca Raton" is GRANTED. To the extent that the district court's 3/28/95 holds Appellant responsible for payment of costs or attorney's fees to Appellees, that order is VACATED. On its own motion, and in light of this court's opinion in 94-4878, the court DISMISSES 95-4496 as moot. /ols
11/20/97	Filing U.S. Supreme Court order: . . . The petition for writ of certiorari is granted. The petition for a writ of certiorari is granted. The brief of the petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 pm, Monday, 12/29/97. The brief of respondent is to be filed with Clerk and served upon opposing counsel on or before 3 pm, Wednesday, 1/28/98. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel or or before 3 pm. Wednesday, 2/18/98. Rule 20.2 does not apply. /ols

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BETH ANN FARAGHER
and NANCY EWANCHEW,

Case No. 92-8010-
Civ-Highsmith

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually, and DAVID SILVERMAN, individually,

Defendants.
_____/

FIRST AMENDED COMPLAINT

Plaintiffs, BETH ANN FARAGHER and NANCY EWANCHEW, sue defendants, CITY OF BOCA RATON, a political subdivision of the State of Florida, BILL TERRY, individually, and DAVID SILVERMAN, individually, and allege:

INTRODUCTION

1. This is a sexual harassment (both quid pro quo and hostile environment) brought by two female former lifeguards against their municipal employer and two supervisors of the city's lifeguard service. Both sue under the equal protection clause of the fourteenth amendment and one brings this action additionally pursuant to Title VII of the Civil Rights Act of 1964, as amended. Both

additionally seek common-law relief against the individual defendants for battery, and against the municipal employer for negligent retention and supervision of the individual defendants. Both seek compensatory damages, punitive damages against the individual defendants, costs and a reasonable attorney's fee.

JURISDICTION

2. This action arises under 42 U.S.C. §§ 1983 and 1988 and Title VII of the Civil Rights of 1964, 42 U.S.C. §§ 2000e, et seq. Jurisdiction is founded on 42 U.S.C. §§ 2000e - 5 (f) (3) and 28 U.S.C. §§ 1331 and 1343 (3) and (4). The court has jurisdiction to grant declaratory and further relief pursuant to 28 U.S.C. §§ 2201 and 2202. The court has supplemental jurisdiction over the common law tort claims pursuant to 28 U.S.C. § 1367.

3. Venue is proper in the West Palm Beach Division of the Southern District of Florida pursuant to 42 U.S.C. § 2000e-5(f) (3) and 28 U.S.C. § 1391 (b) because the claim arose there.

PARTIES

4. Plaintiffs, BETH ANN FARAGHER and NANCY EWANCHEW (hereinafter "FARAGHER" or "EWANCHEW" respectively, or "plaintiffs") at all times material was each employed as an ocean life guard by the CITY OF BOCA RATON.

5. Defendant, CITY OF BOCA RATON (hereinafter, "BOCA RATON"), a political subdivision of the State of Florida, is a Florida municipal corporation. BOCA RATON employs more than 15 persons, including

at all material times, plaintiffs FARAGHER and EWANCHEW and defendants, BILL TERRY and DAVID SILVERMAN. BOCA RATON is an employer under 42 U.S.C. § 2000e (b). At all times material, BOCA RATON knew or should have known of the sexually harassing conduct of defendants BILL TERRY and DAVID SILVERMAN because their harassment of FARAGHER and EWANCHEW was constant, overt and often done in the presence of and/or with the knowledge of other employees.

6. Defendant, BILL TERRY (hereinafter "TERRY"), at all times material was an employee of BOCA RATON and the Marine Safety Chief. He was FARAGHER's and EWANCHEW's direct supervisor, as well as being the direct supervisor of defendant, DAVID SILVERMAN. TERRY is an employer under 42 U.S.C. § 2000e(b). As to compensatory and punitive damages under 42 U.S.C. § 1983 and the common-law battery counts, TERRY is being sued by FARAGHER and EWANCHEW in his individual capacity. At all times material, TERRY was acting under color of law. He is a person under 42 U.S.C. § 1983.

7. Defendant, DAVID SILVERMAN (hereinafter "SILVERMAN"), at all times material was an employee of BOCA RATON as a Marine Safety Captain or Marine Safety Lieutenant. SILVERMAN was the supervisor of FARAGHER and EWANCHEW. SILVERMAN is an employer under 42 U.S.C. § 2000e(b). As to compensatory and punitive damages under 42 U.S.C. § 1983 and the common-law battery counts, SILVERMAN is being sued by FARAGHER and EWANCHEW in his individual capacity. At all times material, SILVERMAN was acting under color of law. He is a person under 42 U.S.C. § 1983.

COMPLIANCE WITH PROCEDURAL REQUIREMENTS

8. FARAGHER timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission, which cross-filed it with the relevant deferral agency.

9. The Department of Justice issued FARAGHER a Notice of Right to Sue dated October 7, 1991.

10. FARAGHER and EWANCHEW have both mailed to the CITY OF BOCA RATON written notice of their claims, as prescribed by § 768.28, Florida Statutes.

GENERAL ALLEGATIONS

11. FARAGHER and EWANCHEW, beginning shortly after each was hired and continuing until each resigned, in 1990 and 1989 respectively, was each subjected to an unwelcome, offensive hostile and intimidating work environment that was so pervasive as to affect a term, condition or privilege of her employment e.g.:

a. TERRY subjected FARAGHER and EWANCHEW each to uninvited and offensive touching, including but not limited to squeezing, rubbing and patting their waists, buttocks, shoulders, thighs and calves.

b. TERRY foreclosed any opportunity of advancement for the females on the ocean lifeguard staff, stating on at least one occasion, "It will be a cold day in hell before I make a woman a lieutenant."

c. TERRY and SILVERMAN both, in the presence of female members of the lifeguard staff, referred to women as "cunts," "sluts," "tits," and "bitches."

d. SILVERMAN repeatedly made inappropriate sexual remarks in the presence of each plaintiff, e.g, he:

(1) requested of each FARAGHER and EWANCHEW, as the woman was showering in the lifeguard headquarters, if he could take a shower with her.

(2) commented on the firmness of FARAGHER's breasts.

(3) stated that a rainy day would give him the opportunity "to sit with Nancy [EWANCHEW] and look at her 'tits.'"

(4) forecasted that a bad weather prediction meant "a 40 per cent chance that I'll get a blow job in my truck today."

(5) suggested to FARAGHER that she spend a rainy day in the back of his truck.

(6) discussed in the presence of women lifeguards his sexual conquests of female beach patrons.

12. SILVERMAN further subjected FARAGHER to quid pro quo sexual harassment, telling her, as her supervisor, "Date me or clean the toilets [at the lifeguard headquarters] for a year."

13. Neither FARAGHER nor EWANCHEW welcomed TERRY's and SILVERMAN's advances or was flattered by their comments. To the contrary, each was upset by the conduct and the words.

14. TERRY and SILVERMAN also acted similarly toward other female co-workers of FARAGHER and EWANCHEW, of which conduct FARAGHER and EWANCHEW each was aware, thereby adding to the pervasiveness of the sexually hostile atmosphere.

COUNT I/Faragher's Title VII Claim

15. FARAGHER realleges and adopts, as if fully set forth in Count I, the allegations of ¶¶ 1-9 and 11-14.

16. FARAGHER is among a class of persons protected by Title VII, i.e., she is female.

17. FARAGHER — by being subjected to the sexually hostile atmosphere created by TERRY and SILVERMAN, and to SILVERMAN's quid pro quo threats — was affected in a "term, condition or privilege" of employment as envisioned by 42 U.S.C. § 2000e 2 (a) (1) in that:

a. her physical and/or psychological well-being was affected;

b. the work place became hostile.

18. The sexually hostile environment to which FARAGHER was subjected was based upon her being female: TERRY and SILVERMAN did not act similarly towards male employees.

19. The conduct of BOCA RATON, by and through

the conduct of its agents TERRY and SILVERMAN, deprived FARAGHER of her statutory rights under 42 U.S.C. § 2000e, et seq.

WHEREFORE, plaintiff, BETH ANN FARAGHER, prays that this court will:

A. Award her nominal damages against the CITY OF BOCA RATON for the sexual harassment visited upon her by SILVERMAN and TERRY in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

B. Grant her costs and a reasonable award of attorney's fees pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e 5(k); and

C. Grant such other and further relief as is just.

COUNT II - Plaintiff, Faragher's § 1983 Damage Claim

20. FARAGHER realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count II.

21. The treatment of FARAGHER at the hands of TERRY and SILVERMAN constituted purposeful discrimination based on FARAGHER's gender and violated her rights under the Fourteenth Amendment to the United States Constitution to equal protection and, specifically, her right to be free of discrimination in the work place based on her sex.

22. As a direct, natural, foreseeable and proximate result of the actions and inactions of TERRY and

SILVERMAN, FARAGHER has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

23. The actions of defendants TERRY and SILVERMAN were so malicious and in such reckless indifference to the federally protected rights of FARAGHER as to entitle her to receive an award of punitive damages to punish the defendants, TERRY and SILVERMAN, and to deter them, and others like them, from such conduct in the future.

WHEREFORE, plaintiff BETH ANN FARAGHER prays that this court will enter judgment for her and against defendants TERRY and SILVERMAN, jointly and severally, for compensatory damages and for the costs of this action (including a reasonable attorney's fee); will enter judgment against defendants TERRY and SILVERMAN, in their individual capacities, for exemplary damages; and will grant such other and further relief as is just.

COUNT III - Plaintiff Ewanchew's § 1983 Damage Claim

24. EWANCHEW realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count II.

25. The treatment of EWANCHEW at the hands of TERRY and SILVERMAN constituted purposeful discrimination based on EWANCHEW's gender and violated her rights under the Fourteenth Amendment to the United States Constitution to equal protection and, specifically, her right to be free of discrimination in the work place based on her sex.

26. The conduct of defendants TERRY and SILVERMAN created conditions under which no reasonable person could continue to work, thereby constructively discharging EWANCHEW.

27. As a direct, natural, foreseeable and proximate result of the actions and inactions of TERRY and SILVERMAN, EWANCHEW has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

28. The actions of defendants TERRY and SILVERMAN were so malicious and in such reckless indifference to the federally protected rights of EWANCHEW as to entitle her to receive an award of punitive damages to punish the defendants, TERRY and SILVERMAN, and to deter them, and others like them, from such conduct in the future.

WHEREFORE, plaintiffs NANCY EWANCHEW prays that this court will enter judgment for each of them and against defendants TERRY and SILVERMAN, jointly and severally, for compensatory damages and for the costs of this action (including a reasonable attorney's fee); will enter judgment against defendants TERRY and SILVERMAN, in their individual capacities, for exemplary damages; and will grant such other and further relief as is just.

COUNT IV - Plaintiff Faragher's Claim for Battery Against Terry

29. FARAGHER realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count IV.

30. The incidents described in ¶ 11(a) constituted actual and intentional touching of FARAGHER by TERRY against the will of FARAGHER.

31. As a direct, natural, foreseeable and proximate result of the actions of TERRY, FARAGHER has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

32. The actions of defendant TERRY were so wanton and willful and in such total disregard of the rights of FARAGHER, as to require the imposition of exemplary damages so as to punish TERRY for his actions and to deter him and others from similar such actions in the future.

WHEREFORE, plaintiff, BETH ANN FARAGHER, prays that this court will enter judgment for her and against defendant TERRY for damages, including for exemplary damages, and for the costs of this action, and will grant such other and further relief as is just.

COUNT V - Plaintiff Ewanchew's Claim for Battery Against Terry

33. EWANCHEW realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count VIII.

34. The incidents described in ¶ 11(a) constituted an actual and intentional touching of EWANCHEW by TERRY against the will of EWANCHEW.

35. As a direct, natural, foreseeable and proximate result of the actions of TERRY, EWANCHEW has suffered injuries and losses, all of which injuries and

losses are continuing and permanent in nature.

36. The actions of defendant TERRY were so wanton and willful and in such total disregard of the rights of EWANCHEW, as to require the imposition of exemplary damages so as to punish TERRY for his actions and to deter him and others from similar such actions in the future.

WHEREFORE, plaintiff NANCY EWANCHEW prays that this court will enter judgment for her and against defendant TERRY for damages, including for exemplary damages, and for the costs of this action, and will grant such other and further relief as is just.

COUNT VI/Faragher's Negligent Retention and Supervision Claim Against Boca Raton

37. FARAGHER realleges the allegations of ¶¶ 1-7 and 10-14 as if fully set forth in this count.

38. Defendant BOCA RATON negligently retained TERRY and SILVERMAN as supervisory employees of its Marine Safety division in that BOCA RATON knew or should have known that TERRY and SILVERMAN routinely sexually harassed female employees.

39. BOCA RATON negligently supervised TERRY and SILVERMAN in that each was permitted to engage in the behavior of which FARAGHER and EWANCHEW complain.

40. The actions of defendants TERRY and SILVERMAN, and through him of defendant BOCA RATON, involved a physical impact upon both FARAGHER and EWANCHEW, as more particularly

alleged at ¶ 11(a), which physical impact caused emotional distress.

41. As the direct and proximate result of BOCA RATON's negligent retention and/or supervision of TERRY and SILVERMAN, FARAGHER has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

WHEREFORE, plaintiff BETH ANN FARAGHER prays for judgment against defendant BOCA RATON for damages, costs and such other and further relief as may be just.

COUNT VII/Ewanchew's Negligent Retention and Supervision Claim Against Boca Raton

42. FARAGHER realleges the allegations of ¶¶ 1-7, 10-14 and 38-40 as if fully set forth in this count.

43. As the direct and proximate result of BOCA RATON's negligent retention and/or supervision of TERRY and SILVERMAN, EWANCHEW has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

WHEREFORE, plaintiff NANCY EWANCHEW prays for judgment against defendant BOCA RATON for damages, costs and such other and further relief as may be just.

Respectfully submitted,

/s/ William R. Amlong
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Dated: September 3, 1992

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been served by mail this date upon the following counsel of record:

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/s/ William R. Amlong
WILLIAM R. AMLONG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-8010-CIV-HIGHSMITH

BETH ANN FARAGHER
and NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually, and DAVID SILVERMAN, individually,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND/OR STRIKE

THIS CAUSE comes before the Court upon Defendants' (City of Boca Raton, Bill Terry, and David Silverman) Motions to Dismiss and/or Strike. Beth Ann Faragher ("Faragher") and Nancy Ewanchew ("Ewanchew"), two female lifeguards, brought this sexual harassment action against their formal municipal employer, the City of Boca Raton ("City"), and two City employees, Bill Terry ("Terry") and David Silverman ("Silverman"). Faragher and Ewanchew assert the following twelve (12) causes of action in their Complaint:

(1) Faragher's claim for joint and several compensatory damages, as well as declaratory and equitable relief and an award of attorney's fees against the City, Terry and Silverman (including Faragher's claim for exemplary damages against Terry and Silverman) pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991.

(2) Faragher's claim for damages against the City, Terry, and Silverman pursuant to 42 U.S.C. § 1983;

(3) Ewanchew's claim for damages against the City, Terry and Silverman pursuant to 42 U.S.C. § 1983;

(4) Ewanchew's claim for injunctive relief against the City, Terry and Silverman pursuant to 42 U.S.C. § 1983;

(5) Faragher's claim for battery against Terry;

(6) Faragher's claim for invasion of privacy against Terry;

(7) Faragher's claim for intentional infliction of emotional distress against Terry and Silverman;

(8) Ewanchew's claim for battery against Terry;

(9) Ewanchew's claim for invasion of privacy against Terry;

(10) Ewanchew's claim for intentional infliction of emotional distress against Terry and Silverman;

(11) Faragher's claim for negligent retention, supervision, and training against the City;

(12) Ewanchew's claim for negligent retention, supervision, and training against the City.

The City moves to strike Faragher's Title VII claim for compensatory and punitive damages, as well as the request for a jury trial in Count I, or in the alternative, to strike Faragher's claim for declaratory and injunctive relief in Count I. Additionally, the City moves to dismiss Counts II, III, IV, XI, and XII. Terry moves to dismiss Count I, or in the alternative, to strike Faragher's claim for punitive damages in Count I. Additionally, Terry moves to dismiss Counts VI, VII, IX, and X, and to strike Faragher and Ewanchew's claim for punitive damages in Counts II and III. Silverman moves to dismiss Count I, or in the alternative, to strike Faragher's claim for punitive damages in Count I. Additionally, Silverman moves to dismiss Counts VII and X, and to strike Faragher and Ewanchew's claim for punitive damages in Counts II and III. The City, Terry, and Silverman also move to dismiss all the state tort claims (Counts V through XII) for lack of pendant jurisdiction.

STANDARD OF REVIEW FOR MOTION TO DISMISS

To state a claim, Fed.R.Civ.P. 8(a) requires, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." The law in this Circuit is well-settled that "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957), cert. denied, 486 U.S. 1055 (1988)). On a motion to dismiss, "[a]ll well-pleaded facts in plaintiffs' complaint and all reasonable inferences drawn from those facts are taken as true." Oladeinde v. City of Birmingham, No. 91-7518, slip op. at 2873 (11th Cir. June 24, 1992).

I. Count I.

In Count I, Faragher asserts a cause of action against the City, Terry, and Silverman for sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.

A. The City's Motion To Strike

The City asserts that this Court should refuse to apply the Civil Rights Act of 1991 retroactively to Faragher's Title VII claim and, accordingly, Faragher's claim for compensatory damages, as well as the request for a jury trial, should be stricken from Count I.

This Court, as well as a number of federal circuit courts that have addressed the issue, have determined that the 1991 Civil Rights Act is not to be applied retroactively to conduct that occurred prior to the date of its enactment. Doe v. Board of County Comm'rs, 783 F. Supp. 1379 (S.D. Fla. 1992).[1] This Court, therefore, will

[1] Johnson v. Uncle Ben's, Inc., No. 91-2590, — F.2d — (5th Cir. July 1, 1992) (held that § 101 of the Civil Rights Act of 1991 does not apply retroactively to pending cases); Luddington v. Indiana Bell Telephone Co., No. 91-2320, — F.2d — (7th Cir. June 15, 1992) (held that Civil Rights Act of 1991 is applicable only to conduct engaged in after the effective dates in the act); Fray v. Omaha World (continued...)

apply the law that was in effect prior to enactment of the 1991 Act. Thus, the City's motion to strike Faragher's claim for compensatory damages, as well as the request for a jury trial in Count I is GRANTED.

The City also seeks to strike Faragher's claim for declaratory and injunctive relief. To obtain declaratory or injunctive relief, a plaintiff must demonstrate: the likelihood of future injury; that such injury will occur at the hands of the defendant; and that the relief plaintiff seeks is likely to prevent such injury from occurring Cone Corp. v. Florida Dept. of Transp., 921 F.2d 1190, 1203 (11th Cir. 1991), cert. denied, 111 S. Ct. 2238 (1991).

Faragher is no longer employed by the City and does not seek reinstatement to her position. She, therefore, cannot show any likelihood of future injury. Faragher may not obtain an injunction to restrain practices which allegedly injured her in the past, but which no longer affect her. Henson v. City of Dundee, 682 F. 2d 897, 905 (11th Cir. 1982). Furthermore, because Faragher cannot show any likelihood of future injury, a declaration that the City's actions violated her statutory rights "would [be] nothing more than a gratuitous comment without any force or effect." Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir. 1985). Thus, the City's motion to strike Faragher's claim for declaratory and injunctive relief in Count I is GRANTED.

[1](...continued)
Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992) (held that § 101 of the Civil Rights Act of 1991 does not apply retroactively to pending cases or other pre-enactment conduct); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992) (held that Civil Rights Act of 1991 does not apply retroactively to Plaintiff's claim for damages).

B. Terry and Silverman's Motion To Dismiss

Terry and Silverman assert that Faragher has failed to allege sufficient facts to state a claim for relief under Title VII for the reason that government supervisors sued in their individual capacities are not proper party defendants in a Title VII action. This Court finds that individual capacity suits against an individual employee under Title VII are inappropriate. Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991). "The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act." Id. at 772. Neither Terry nor Silverman, as employees, may be sued under Title VII in their individual capacities. Thus, both Terry's and Silverman's motions to dismiss Count I are GRANTED. Count I, as it attempts to assert a cause of action against Terry and Silverman in their individual capacities is DISMISSED with prejudice.

C. Punitive Damages

In Count I, Faragher seeks punitive damages against Terry and Silverman. As this Court has dismissed Count I with prejudice as against Terry and Silverman, their motions to strike Faragher's claim for punitive damages in Count I are, therefore, DENIED as moot.

II. Counts II, III, and IV.

In Count II, Faragher asserts a cause of action against the City, Terry, and Silverman for civil rights violations, pursuant to 42 U.S.C. § 1983. In Count III, Ewanchew asserts a cause of action against the City, Terry, and Silverman for civil rights violations, pursuant to 42 U.S.C. § 1983. In Count IV, Ewanchew seeks injunctive relief against the City, Terry, and Silverman for civil rights

violations, pursuant to 42 U.S.C. § 1983. The standard for assessing the sufficiency of a § 1983 claim is similar to the standard enunciated above. However, courts have tightened the application of Rule 8(a) to § 1983 cases in an "effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation." Arnold v. Board of Educ., 880 F.2d 305, 309 (11th Cir. 1989). "In pleading a section 1983, some factual detail is necessary. . ." Oladeinde v. City of Birmingham, No. 91-7518, slip op. at 2872 (11th Cir. June 24, 1992).

The City moves to dismiss Counts II, III, and IV on the basis that Faragher and Ewanchew have failed to sufficiently allege a cause of action under 42 U.S.C. § 1983. For the following reasons, this Court agrees with the City.

A. Municipal Liability

In Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658, 694 (1978), the United States Supreme Court created a right of action against local government units for deprivation of federal rights in violation of 42 U.S.C. § 1983. The Supreme Court stated that municipal liability under § 1983 attached only when a constitutional deprivation occurs pursuant to a municipality's "official policy."[2] Id. at 694. Thus, under Monell, "recovery from a municipality is limited to acts that are, properly

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[2] The term "official policy" is not limited to written laws. It may also include a custom or usage, even though such a custom or usage has not received formal approval through the municipal body's official decision making channels." Monell, 436 U.S. at 691. According to the Supreme Court, Congress included customs and usages in § 1983 because customs and usages may be so widespread and accepted that they have the force of law. Id. (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)).

speaking, acts 'of the municipality' that is, acts which the municipality has officially sanctioned or ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

Subsequent to the Monell decision, the United States Supreme Court elaborated the doctrine of municipal liability into several separate theories.[3] Faragher and Ewanchew attempt to state a cause of action under one of the following two theories: (1) that notwithstanding written rules and policies to the contrary, the City effectively delegated final decision making authority to Terry and Silverman on the issue of sexual harassment of female lifeguards (Complaint, at ¶ 5a, D.E. # 1.); and (2) that the actions of Terry and Silverman were so widespread that the City knew or should have known of the alleged sexual harassment (Complaint, at ¶ 5b, D.E. # 1.).

B. Sufficiency of the Complaint
Final Policymaker

Under this theory, liability attaches "where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (emphasis added). State law determines whether an official is a "final" policymaking authority with respect to the specific subject matter. Id. at 483. "[T]he mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policymaking authority. Rather, the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies and are not subject to

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[3] This Court will only address two of those theories because only two are alleged by Faragher and Ewanchew.

review." Wright v. Sheppard, 919 F.2d 665, 674 (11th Cir. 1990) (quoting Mandel v. Doe, 888 F.2d 783, 792 (11th Cir. 1989)).

Upon a careful reading of Faragher and Ewanchew's Complaint, this Court can find no allegation that Terry or Silverman were the officials responsible for establishing final governmental policy with respect to proscriptions on sexual harassment. To the contrary, by alleging that Terry and Silverman were delegated this authority contrary to written rules and policies, Faragher and Ewanchew are alleging that somebody else had the final authority to make rules and regulations concerning sexual harassment. Therefore, taken as true for purposes of this motion to dismiss, Faragher and Ewanchew's allegation that Terry and Silverman were "effectively delegated . . . final decision-making authority" is insufficient to state a cause of action under § 1983.

Municipal Custom

Under this theory, a plaintiff must establish a widespread practice that, "although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law,'" City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1986) (quoting Adickes, 398 U.S. at 167-68). "In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991).

Faragher and Ewanchew do not sufficiently allege a widespread custom. This case is unlike Brown, where plaintiff repeatedly alleged that his experiences were the

result of discriminatory practices accepted by the police department. Brown, 923 F.2d at 1481.[4] Faragher and Ewanchew do not allege any facts that indicate that the City had a widespread practice of either allowing sexual harassment or failing to stop it. Instead, Faragher and Ewanchew allege, in conclusory fashion, that the City knew of Terry and Silverman's alleged harassment because their alleged harassment was constant and done in front of other employees. (Complaint, at ¶ 5b, D.E. # 1.) In light of the heightened pleading requirements for § 1983 causes of action,[5] merely alleging that the City knew or should have known of the alleged sexually harassing conduct of Terry and Silverman, without supporting facts, is insufficient to state a cause of action under § 1983.

Thus, the City's motion to dismiss Counts II, III, and IV is GRANTED. Counts II, III, and IV are DISMISSED without prejudice.

C. Punitive Damages

In Counts II and III, Faragher and Ewanchew seek punitive damages against Terry and Silverman. Terry and Silverman move to strike Faragher and Ewanchew's claim for punitive damages in Counts II and III. Because Counts II and III do not state causes of action upon which relief may be granted, Faragher and Ewanchew may not seek punitive damages in Counts II and III. Terry's and Silverman's motions to strike punitive damages in Counts

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[4] The plaintiff in Brown alleged a **series** of discriminatory practices and that the police chief had knowledge of and acquiesced in those practices. Brown, 923 F.2d at 1481 (emphasis added).

[5] See, supra, Arnold, 880 F.2d at 309; Oladeinde, No. 91-7518, slip op. at 2872.

II and III are, therefore, DENIED without prejudice as moot.

III. Counts V through XII.

A. Pendant Jurisdiction

In Counts V through XII, Faragher and Ewanchew assert various state tort claims. The City, Terry, and Silverman move to dismiss the state claims on the basis of potential jury confusion.

The United States Supreme Court, in United Mine Workers v. Gibbs, 383 U.S. 715 (1966) articulated the doctrine of pendant jurisdiction, and permitted federal courts to exercise jurisdiction over causes of action that contained both federal claims and state claims, based upon a two-step analysis. First, a federal court has power to hear the state claims when the federal and state claims "derive from a common nucleus of operative fact" and are "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding." Gibbs, 383 U.S. at 725. Secondly, the justification for a federal court's discretion to exercise pendant jurisdiction "lies in considerations of judicial economy, convenience and fairness to the litigants." Gibbs, 383 U.S. at 726.

Recently, Congress codified the doctrine of pendant jurisdiction articulated in Gibbs under the heading of supplemental jurisdiction. 28 U.S.C.A. § 1367 (West Supp. 1991).[6] The statute allows a district court to decline

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[6] 28 U.S.C.A. § 1367(a) (West Supp. 1991) provides:

"... the district courts shall have supplemental jurisdiction over

(continued...)

to exercise supplemental jurisdiction if:

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C.A. § 1367 (c) (West Supp. 1991).

This Court finds that none of the above statutory factors are met in this case. Refusal to exercise pendant jurisdiction in this case would require substantially duplicative proceedings in federal and state courts. See Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983) (applying Gibbs, the Eleventh Circuit held that the district court did not abuse its discretion in exercising jurisdiction where plaintiff alleged a Title VII violation along with the pendant state claims of battery and invasion of privacy). Witnesses in this case, like the witnesses in Phillips, would be forced to testify to the same facts twice if the court refused to exercise its pendant jurisdiction. Phillips, 711 F.2d at 1531.

Based on the above considerations, this Court

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[6](...continued)
all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United State Constitution."

concludes that judicial economy, convenience, and fairness to all litigants is best served by maintaining one action. Thus, the City's, Terry's, and Silverman's motions to dismiss the pendant state claims (Counts V through XII) on the basis of lack of pendant jurisdiction are DENIED.

B. Counts VI and IX (Invasion of Privacy)

In Count VI, Faragher asserts a claim for invasion of privacy against Terry. In Count IX, Ewanchew asserts a claim for invasion of privacy against Terry. Both counts are based on the alleged uninvited and offensive touchings by Terry, which Faragher and Ewanchew claim constituted an unwelcome intrusion into their physical solitude. (Complaint, at ¶ 11a, D.E. # 1.) Terry moves to dismiss Counts VI and IX on the basis that Faragher and Ewanchew have not sufficiently alleged a cause of action for invasion of privacy.

This Court finds that Faragher and Ewanchew have not sufficiently alleged a cause of action for invasion of privacy by Terry. The Eleventh Circuit, in Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983), examined Alabama law and determined that the language "wrongful intrusion into one's private activities" was equivalent to the language in § 652B, Restatement (Second) of Torts (1977). Phillips, 711 F.2d at 1534.[7] Therefore, the Eleventh Circuit held that

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[7] § 652B, Restatement (Second) of Torts (1977) states:

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a

(continued...)

Alabama had recognized the tort of invasion of privacy in the form described in the Restatement. Phillips, 711 F.2d at 1534.

Florida Courts have recognized the tort of invasion of privacy that consists of "intrusion upon the plaintiff's physical solitude or seclusion as by invading his home . . ." Guin v. City of Riviera Beach, 388 So. 2d 604, 606 (Fla. 4th DCA 1980) (citing W. Prosser, Torts § 117, at 807 (4th ed. 1971)). This language is even more equivalent to § 652B than the language examined in Phillips. Therefore, this Court will apply § 652B and is bound by the interpretation given it by the Eleventh Circuit.

In Phillips, the Eleventh Circuit concluded that under § 652B, a female defendant who was subjected to frequent, intrusive, and coercive sexual demands and threats from her employer had stated a cause of action for invasion of privacy because such conduct constituted an "examination into her 'private concerns,' that is, improper inquiries into her personal sexual proclivities and personality." Phillips, 711 F.2d at 1536.[8] Other courts have

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[7](...continued)
reasonable person."

[8] In Phillips, the employer had called Plaintiff into his office, locked the door, and inquired how often Plaintiff had sex with her husband, what positions they used, and if Plaintiff had ever engaged in oral sex. Phillips, 711 F.2d at 1527. This happened two to three times a week. Id. The employer, in later conversations insisted that Plaintiff engage in oral sex with him on penalty of losing her job. Id. This happened on several occasions. Id. On one occasion, the employer began to cover the window in his office with paper to prohibit anyone from seeing inside, and as Plaintiff forced her way out of the office, the employer hit her across the bottom with the back of his hand. Id.

concluded that sexual comments alone,[9] or comments combined with incidents of touching do not constitute an invasion of privacy.[10] Faragher and Ewanchew only allege that Terry subjected them to "squeezing, rubbing and patting (of plaintiffs') waists, buttocks, shoulders, thighs, and calves" (Complaint, at ¶ 11a, D.E. #1.); and that Terry referred to women as "cunts," "sluts," "tits," and "bitches." This Court finds that both this alleged conduct and this alleged language are offensive and rude. However, this alleged conduct and language does not rise to the level of intrusiveness found in Phillips to constitute an invasion of privacy under § 652B. Thus, Terry's motion to dismiss counts VI and IX is GRANTED. Counts VI and IX are DISMISSED without prejudice.

C. Counts VII and X (Intentional Infliction of Emotional Distress)

In Count VII, Faragher asserts a cause of action against Terry and Silverman for intentional infliction of emotional distress. In Count X, Ewanchew asserts a cause of action against Terry and Silverman for intentional infliction of emotional distress. Terry and Silverman move to dismiss Counts VII and X on the basis that Faragher and Ewanchew have failed to sufficiently allege a cause of action for intentional infliction of emotional distress.

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[9] Ponton v. Scarfone, 468 So. 2d 1009 (Fla. 2nd DCA 1985) (utterances intended to induce plaintiff to join defendant in a sexual liaison did not constitute an invasion of privacy).

[10] Haehn v. City of Hoisington, 702 F. Supp. 1526 (D. Kan. 1988) (under Kansas law interpretation of § 652B, defendant's sexual comments and brief touchings did not rise to the level of intrusion found in Phillips and, therefore, did not constitute invasion of privacy).

Florida has adopted the Restatement (Second) of Torts (1965)'s standard for the tort of intentional infliction of emotional distress. Eastern Airlines, Inc. v. King, 557 So. 2d 574, 575 (Fla. 1990). The Restatement defines intentional infliction of emotional distress as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts § 46 (1965). Outrageous conduct is conduct which "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277, 278-79 (Fla. 1985) (quoting Restatement (Second) of Torts, § 46, cmt. D (1965)).

Florida courts, as well as federal courts in this circuit, have been unwilling to find a cause of action for intentional infliction of emotional distress in the employment context. This Court is not aware, and Faragher and Ewanchew have not cited a single case arising under Florida law where a court has recognized a cause of action for intentional infliction of emotional distress based on sexual harassment. On the contrary, Florida courts and federal courts in this circuit have continually not found a cause of action for intentional infliction of emotional distress based on sexual harassment. See Studstill v. Borg Warner Leasing, 806 F.2d 1005, 1007-08 (11th Cir. 1986) (the court held that

plaintiff's allegations of sexual harassment, including dirty jokes, off-color comments, and profane suggestions did not constitute conduct sufficiently heinous to support a claim for intentional infliction of emotional distress); Forde v. Royal's Inc., 537 F. Supp. 1173, 1174-76 (S.D. Fla. 1982) (court rejected an intentional infliction of emotional distress claim where plaintiff alleged she had been subjected to unsolicited sexual invitations from her supervisor); Ponton v. Scarfone, 468 So. 2d 1009, 1011 (Fla. 2d DCA 1985) (employer's conduct in attempting to induce an employee to join with him in a sexual liaison did not rise to the level of outrageousness necessary to state a cause of action for intentional infliction of emotional distress).

This Court takes note that the Florida Supreme Court has recognized that "public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist." Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1104 (Fla. 1989) (citations omitted). The Court deplores the offensive behavior of both Terry[11] and Silverman,[12] and hopes that such behavior becomes

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[11] Faragher and Ewanchew allege that Terry squeezed, rubbed, and patted their waists, buttocks, shoulders, thighs and calves; and referred to women as "cunts," "sluts," "tits," and "bitches." (Complaint, at ¶ 11a, 11c, D.E. #1.)

[12] Faragher and Ewanchew allege that Silverman referred to women as "cunts," "sluts," "tits," and "bitches;" and that Silverman made inappropriate sexual remarks in the presence of each Plaintiff. (Complaint, at ¶ 11c, 11d, D.E. #1.) Silverman's remarks include:

> (1) requesting to shower with Faragher and Ewanchew, while Faragher and Ewanchew were showering in the lifeguard headquarters;

(continued...)

extinct in the workplace. However, neither the allegations of Terry's uninvited touchings and foul language, nor the allegations of Silverman's foul language and unsolicited sexual invitations, taken separately, rise to the level of outrageousness necessary to state a claim for intentional infliction of emotional distress. Therefore, Terry's and Silverman's motions to dismiss Counts VII and X are GRANTED. Counts VII and X are DISMISSED without prejudice.

D. Counts XI and XII (Negligent Retention, Supervision and Training

In Count XI, Faragher asserts a cause of action against the City for negligent retention, supervision, and training. In Count XII, Ewanchew asserts a cause of action against the City for negligent retention, supervision, and training. The City moves to dismiss Counts XI and XII on the basis that the City is sovereignly immune or, in the alternative, that the Workers' Compensation Act provides the exclusive remedy for injuries caused by the negligence of the employer.

Fla. Stat. § 768.28 (1989) waived sovereign immunity and made political subdivisions liable for torts in the same

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[12](...continued)

(2) commenting on the firmness of Faragher's breasts;
(3) stating that a rainy day would give him an opportunity to sit with Ewanchew and look at her "tits;"
(4) forecasted that a bad weather prediction meant a 40 per cent chance that he'll get a blow job in his truck;
(5) suggested to Faragher that she spend a rainy day in the back of his truck; and
(6) discussed his sexual conquests of female beach patrons in the presence of women lifeguards.

manner as private individuals. The broad purpose of this statute is to waive sovereign immunity. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). In interpreting this statute, the Florida Supreme Court has determined that certain "discretionary" planning level functions are immune from liability, while certain "operational" decisions are not. Id. at 1021 (emphasis added). In order to determine whether the challenged act is discretionary or operational, the Florida courts have adopted a case by case method of identifying these functions based on Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965), and Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

The courts of Florida also developed a definition for discretionary and operational functions. A discretionary act is an exercise of executive or legislative power such that, for the courts to intervene by way of tort law, they would inappropriately entangle themselves in fundamental questions of policy and planning; while an operational function is one not necessarily inherent in policy or planning, but merely reflects a secondary decision as to how those policies or plans are implemented. Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989).

Before turning to the tests which help determine whether an act or decision is discretionary or operational, this Court must first consider whether there is a common law or statutory duty. There can be no governmental liability "if *either* (a) no duty of care existed, *or* (b) the doctrine of governmental immunity bars the claim." Kaisner, 543 So. 2d at 734.

The City, by instituting a policy against sexual harassment in the workplace, has a duty to keep the

workplace free from sexual harassment. Once the City has initiated a policy against sexual harassment, it assumes a duty to operate this policy effectively.[13] In operating this policy effectively, certain decisions must be made regarding supervision and retention of employees accused of sexual harassment. Such decisions regarding supervision and retention of employees, are part of, and not separate from, a decision to institute a policy against sexual harassment in the workplace.

The decision whether or not to train employees with respect to sexual harassment is a separate decision that may or may not be part of a policy against sexual harassment. This Court is not aware of any duty that exists to train employees with respect to sexual harassment. Therefore, the only way a duty of care could arise with respect to training employees with regard to sexual harassment, is if the City assumed a duty to do so by implementing training procedures. In their Complaint, Faragher and Ewanchew allege that the City "afforded no formal or informal in-service or other training." (Complaint, at ¶53, D.E. # 1.) Thus, this Court finds that Faragher and Ewanchew have failed to allege sufficient facts, whereby this Court could find a duty of care on the part of the City to train its employees with respect to sexual harassment.

Next, the Court must determine whether the City is immune from decisions relating to the supervision and

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[13] See Avallone v. Board of County Comm'rs of Citrus County, 493 So. 2d 1002 (Fla. 1986) (the decision to operate or not operate a swimming pool is discretionary, but once the County decides to operate the swimming facility, it assumes a common law duty to operate the facility safely and is no longer immune from suit on that decision).

retention of employees.[14] Applying the tests and definitions that determine whether a decision or act is discretionary or operational, this Court finds that decisions relating to the supervision and retention of Terry and Silverman are operational, and not immune from suit.

The test in Johnson is whether the act of the County in deciding whether or not to supervise or retain Terry and Silverman involved quasi-legislative policy-making which is sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision. Johnson, 69 Cal. 2d at 794, 447 P.2d at 360-61, 73 Cal. Rptr. at 248-49, *adopted in* Commercial Carrier, 371 So. 2d at 1021-22. The answer is no with respect to decisions regarding the retention and supervision of Terry and Silverman. Decisions regarding the retention and supervision of Terry and Silverman are not legislative, but are merely secondary decisions that are necessary in effectively operating a policy against sexual harassment.

In Evangelical, the Court enunciated a four-part test:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

(2) Is the questioned act, omission, or decision essential to the realization or

---

[14] The Court need not address whether the City is immune from suit with respect to the decision of whether or not to train employees because Faragher and Ewanchew have failed to allege the existence of duty to train employees with respect to sexual harassment.

accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Evangelical, 67 Wash. 2d at 255, 407 P.2d at 445 (adopted in Commercial Carrier, 371 So. 2d at 1019).

First, decisions regarding supervision and retention of employees accused of sexual harassment involves the basic governmental policy of keeping the workplace free from sexual harassment.

Second, decisions regarding the supervision and retention of employees accused of sexual harassment are not essential to the basic policy concerning sexual harassment, but are secondary to that policy, once the decision to implement such a policy has been made.

Third, decisions regarding the supervision and retention of employees accused of sexual harassment do not require basic policy evaluation and expertise on the part of the City, but involve secondary judgments as to how City policies against sexual harassment are implemented.

Fourth, the City has the authority to make decisions regarding the supervision and retention of employees accused of sexual harassment.

Under the analysis in Commercial Carrier, these tests are very persuasive. 371 So. 2d at 1019. If these questions are clearly and unequivocally answered yes, then the challenged act, omission, or decision is probably a policy-making, planning function immune from liability. Commercial Carrier, 371 So. 2d at 1019. If one or more of the questions is answered in the negative, further inquiry is necessary. Commercial Carrier, 371 So. 2d at 1019. We thus turn to definitions of operational and discretionary stated in Kaisner, 543 So. 2d at 737.

While decisions relating to supervision and retention of employees accused of sexual harassment involve a degree of discretion, this Court finds that it is not the type of discretion that needs to be insulated from suit. Intervention of the courts in cases involving the supervision and retention of employees accused of sexual harassment will not entangle them in fundamental questions of public policy and planning. This Court will merely be required to determine if the City should have acted more carefully in protecting Faragher and Ewanchew from sexual harassment in the workplace. This Court will not be required to examine if the City should or should not institute a policy against sexual harassment and what type of policy that should be. The City has already made that decision. This Court will merely be required to determine if the County was negligent in operating this policy.

Therefore, the City is not entitled to sovereign immunity, pursuant to Fla. Stat. § 768.28, based on its alleged negligent supervision and retention of Terry and

Silverman.

The City also asserts that Faragher and Ewanchew's claim for the negligent retention, supervision, and training of Terry and Silverman is barred by the exclusivity provision of the state's Workers' Compensation Act.

Florida's Workers' Compensation Act, Fla. Stat. § 440.11 (West 1991), states that an employer's liability to its employees "shall be exclusive and in place of all other liability." The Florida Supreme Court has stated that it is "now well established in our law, that workers' compensation generally is the sole tort remedy available to a worker injured in a manner that falls within the broad scope and policies of the workers' compensation statute." Byrd v. Richardson-Greenshields Securities, 552 So. 2d 1099, 1100 (Fla. 1989). However, in Byrd, the Florida Supreme Court created an exception to the exclusivity rule for sexual harassment claims. In Byrd, female employees brought claims for assault and battery, intentional infliction of emotional distress, and negligent hiring and retention of employees based upon male employees repeatedly touching and making verbal sexual advances to them in the work place. The Florida Supreme Court stated:

> "In light of this overwhelming public policy, we cannot say that the exclusivity rule of the workers' compensation statute should exist to shield an employer from all tort liability based on incidents of sexual harassment. The clear public policy emanating from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment. Applying the exclusivity rule of

> workers' compensation to preclude any and all tort liability effectively would abrogate this policy, undermine the Florida Human Rights Act, and flout Title VII of the Civil Rights Act of 1964.
>
> This, we cannot condone. Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law. . . .
>
> Similarly, to the extent that the claim alleges assault, intentional infliction of emotional distress arising from sexual harassment of the specific type of battery involved in this case, the exclusivity rule also will not bar them. This is so because these causes of action address the very essence of the policies against sexual harassment-an injury to intangible personal rights."

Byrd, 552 So. 2d at 1103-4 (footnotes omitted).

Therefore, in light of the strong public policy against sexual harassment in the workplace, this Court interprets Byrd as holding that the exclusivity rule of the workers' compensation statute does not bar Faragher's and Ewanchew's claim of negligent retention, supervision, and training.

Taken as true for purposes of this motion to dismiss, the allegations of Faragher and Ewanchew are sufficient to state a claim for the negligent retention and supervision of Terry and Silverman. Taken as true for purposes of this motion to dismiss, the allegations of Faragher and

Ewanchew are not sufficient to state a claim for the negligent training of Terry and Silverman. Thus, the County's motion to dismiss Counts XI and XII are GRANTED with respect to the negligent training claim and DENIED with respect to the negligent retention and supervision claim. Counts XI and XII as they pertain to Faragher's and Ewanchew's claim for negligent training are DISMISSED without prejudice.

IV. Conclusion

Based on the foregoing considerations, it is hereby

ORDERED AND ADJUDGED that:

(1) The City's motion to strike Faragher's claim for compensatory damages, as well as the request for a jury trial in Count I is GRANTED. The City's motion to strike Faragher's claim for declaratory and injunctive relief in Count I is GRANTED.

(2) Terry's and Silverman's motion to dismiss Count I is GRANTED and Count I, as it attempts to assert a cause of action against Terry and Silverman in their individual capacities, is DISMISSED with prejudice. Furthermore, Terry's and Silverman's motions to strike Faragher's claim for punitive damages in Count I are DENIED as moot.

(3) The City's motion to dismiss Counts II, III, and IV is GRANTED and Counts II, III, and IV are DISMISSED without prejudice. Therefore, Terry's and Silverman's motions to strike punitive damages in Counts II and III are DENIED without prejudice as moot.

(4) The City's, Terry's, and Silverman's motions to

dismiss the state tort claims (Counts V through XII) for lack of pendant jurisdiction are DENIED.

(5) Terry's motion to dismiss Counts VI and IX is GRANTED and Counts VI and IX are DISMISSED without prejudice.

(6) Terry's and Silverman's motions to dismiss Counts VII and X are GRANTED and Counts VII and X are DISMISSED without prejudice.

(7) The City's motion to dismiss Counts XI and XII is GRANTED with respect to Faragher's and Ewanchew's claim for negligent training, and DENIED with respect to Faragher's and Ewanchew's claim for negligent retention and supervision. Counts XI and XII are DISMISSED without prejudice as they pertain to Faragher's and Ewanchew's claim for negligent training.

Faragher and Ewanchew have fifteen (15) days from the date of this order in which to file an Amended Complaint.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of August, 1992.

/s/_____
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BETH ANN FARAGHER and NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually and DAVID SILVERMAN, individually,

Defendants.
_____/

CASE NO. 92 8010 CIV-HIGHSMITH

ANSWER OF CITY OF BOCA RATON TO FIRST AMENDED COMPLAINT

The City of Boca Raton ("Defendant"), by and through its undersigned counsel, hereby respond to the numbered paragraphs of plaintiffs' complaint as follows:

Introduction

1. Defendant **admits** the nature of the suit, but **denies** that plaintiffs are entitled to any relief.

Jurisdiction

2. **Admit.**

3. **Admit.**

Parties

4. Defendant **admits** that plaintiffs were employed as alleged, but **denies** that such employment was during all times material.

5. Defendant **admits** that it is a political subdivision of the State of Florida; that it is a municipal corporation; that it is an employer under 42 U.S.C. § 2000e (b); and that it employs more than 15 persons, but the remaining allegations in paragraph 5 are **denied**.

6. Defendant **admits** that defendant Bill Terry was an employee of the City of Boca Raton; that he was the Marine Safety Chief; that he had supervisory responsibilities over plaintiffs Faragher and Ewanchew, as well as defendant David Silverman; that he is being sued by plaintiffs in his individual capacity with regard to the § 1983 and battery counts; that he acted under color of state law; and that he is a person under 42 U.S.C. § 1983, but the remaining allegations in paragraph 6 are **denied.**

7. Defendant **admits** that defendant David Silverman was an employee of the City as a Marine Safety Captain or Marine Safety Lieutenant; that he had some supervisory responsibilities over plaintiffs Faragher and Ewanchew; that he is being sued by plaintiffs in his individual capacity; and that he is a person under 42 U.S.C. § 1983, but the remaining allegations in paragraph 7 are **denied**.

Compliance with Procedural Requirements

8. Defendant **admits** that Faragher filed a charge of discrimination with the Equal Employment Opportunity Commission which cross-filed it with the

relevant deferral agency; however, defendant is without knowledge as to the timeliness of Faragher's charge and therefore **denies** that it was timely filed.

9. **Admit.**

10. **Admit.**

General Allegations

11. Although based on its investigation defendant City of Boca Raton believed that defendants Terry and Silverman engaged in some offensive work place conduct, defendant **denies** that plaintiffs were "subjected to an unwelcome, offensive, hostile and intimidating work environment that was so pervasive as to effect a term, condition or privilege of Faragher's employment." Defendant further **denies** the allegations as stated in sub-paragraphs 11(a)-(d).

12. **Deny.**

13. Without knowledge and therefore **denied.**

14. **Deny.**

Count I - Faragher's Title VII Claim Against the City of Boca Raton

15. Defendant answers as in the numbered paragraphs above.

16. **Admit.**

17. **Deny.**

18. **Deny.**

19. **Deny.**

Count VI - Faragher's Negligent Retention and Supervision Claim Against the City of Boca Raton

37. Defendant City of Boca Raton answers as in the numbered paragraphs above.

38. **Deny.**

39. **Deny.**

40. **Deny.**

41. **Deny.**

Count VII - Ewanchew's Negligent Retention and Supervision Claim Against the City of Boca Raton

42. Defendant City of Boca Raton answers as in the numbered paragraphs above.

43. **Deny.**

Additional Defenses

1. The complaint fails to state a claim upon which relief may be granted.

2. Plaintiffs have failed to mitigate their damages.

3. Plaintiff's Title VII claim was not timely filed

and is thus barred.

4. Plaintiff is not entitled to attorney's fees based on an award of nominal damages under Title VII.

5. Plaintiffs participated in and consented to the complained of workplace environment.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS
Counsel for Defendants

/s/ Peter J. Hurtgen
PETER J. HURTGEN
Florida Bar No. 229921
CATHY M. STUTIN
Florida Bar No. 865011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to William R. Amlong, Esq., Amlong & Amlong, P.A., 101 N.E. 3rd Avenue, Suite 203, Fort Lauderdale, Florida 33301 and Stuart A. Goldstein, Esq., 444 Brickell Avenue, Suite 300, Miami, Florida, 33131 on this 21st day of September, 1992.

/s/_____
Peter J. Hurtgen

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BETH ANN FARAGHER
and NANCY EWANCHEW, Case No. 92-8010-Civ-Highsmith

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually, and DAVID SILVERMAN, individually,

Defendants.
_____/

NOTICE OF SERVICE OF ANSWERS TO INTERROGATORIES

Plaintiff BETH ANN FARAGHER hereby gives notice of service of answers to Defendant's First Interrogatories to Plaintiff filed over certificate of service dated April 20, 1992.

Respectfully submitted,

/s/ William R. Amlong
WILLIAM R. AMLONG
Fla. Bar No. 470228
AMLONG & AMLONG, P.A.
Attorneys for Plaintiffs
101 N.E. Third Avenue, #203
Fort Lauderdale, Florida 33301
(305) 462-1983

Dated: June 8, 1992

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been served by mail this date upon the following counsel of record:

Stuart A. Goldstein
Attorney for Defendant Silverman
444 Brickell Avenue
Suite 300
Miami, Florida 33131

Peter Hurtgen, Esq.
Morgan, Lewis & Bockius
Attorneys for Defendants City of Boca Raton and Terry
5300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131

/s/ William R. Amlong
WILLIAM R. AMLONG

4. If you have any physical complaints or emotional injuries which you attribute to these incidents, please state the nature of all such complaints.

4. Because of the situation involved in working with SILVERMAN and TERRY, I have suffered diminished self-esteem and self-respect; humiliation, embarrassment.

5. Please state the name and addresses of any and all psychologists, physicians, psychiatrists, therapists and/or hospitals where you received any treatment whatsoever following these incidents or complaints and the dates of all visits and confinements and the nature of any such treatment.

5. None.

6. If you have ever had any other injuries complaints or symptoms before these incidents or complaints which were in any way similar to those you sustained in these incidents or complaints, list your injuries and complaints, giving the dates such similar conditions occurred.

6. None.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-8010-CIV-HIGHSMITH

BETH ANN FARAGHER and
NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a
political subdivision of the
State of Florida; BILL TERRY,
individually, and DAVID
SILVERMAN, individually,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Defendant City of Boca Raton's ("City") motion for partial summary judgment, pursuant to Fed.R.Civ.P. 56(d). Plaintiffs Beth Ann Faragher and Nancy Ewanchew, two females formerly employed as lifeguards by the City bring this action against the City, and two City employees, Bill Terry and David Silverman, alleging that Terry and Silverman subjected them to sexual harassment.

In their amended complaint, Faragher and Ewanchew assert equal protection claims against Terry and

Silverman, individually, pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment. They also assert claims for common law battery against Terry. As to the City, the amended complaint includes the following causes of action: Faragher's sexual harassment claim, pursuant to Title VII of the Civil Rights Act of 1964 (Count I); and Faragher's and Ewanchew's claims for negligent retention and supervision of Terry and Silverman (Counts VI and VII). In its motion, the City seeks partial summary judgment as to all three of these counts.

STANDARD OF REVIEW

In deciding motions for summary judgment, the Court must use as its guide the standard set forth in Fed.R.Civ.P. 56(c), which states in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The United States Supreme Court has addressed the standard for summary judgment, as set forth in Rule 56(c), as follows:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of

a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

After the moving party has met this initial burden, "[tlhe evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Fed.R.Civ.P. 56(e), however, does not permit the nonmoving party to avoid summary judgment by resting on the pleadings, but "requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Moreover, the mere existence of a scintilla of evidence in support of the non-movant's position is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. Anderson, 477 U.S. at 251-52.

UNDISPUTED MATERIAL FACTS

1. Plaintiffs Faragher and Ewanchew worked as lifeguards in the City's Marine Safety Division, which is part of the City's Parks and Recreation Department.

2. The City employed Faragher from September 1985 through June 1990, and Ewanchew from April 1987 through April 1989.

3. Defendant Terry was the Chief of the Marine Safety Division throughout the plaintiffs' tenure in that division.

4. Defendant Silverman was hired by the City as a lifeguard in January 1980, was promoted to lieutenant

in July 1985, and to captain in June 1989.

5. In April, 1989, Ewanchew resigned her position with the City.

6. Faragher resigned her position in June, 1990, to attend law school. Her decision to leave the City was unrelated to the alleged sexual harassment.

7. On April 23, 1990, Ewanchew wrote a letter to Richard Bender, Director of Personnel for the City, complaining that, during the time she was employed by the City, she and other female lifeguards had been sexually harassed by Terry and Silverman.

8. Prior to Ewanchew's letter, neither Ewanchew nor Faragher had complained to the Parks and Recreation Department management about their allegations of sexual harassment.

9. The same union bargaining unit has represented the lifeguards and lieutenants working for the Marine Safety Division since sometime before 1985. The unit has a collective bargaining agreement with the City, which includes an employee grievance and arbitration procedure. Faragher and Ewanchew did not initiate grievance proceedings.

10. Based on its investigation of Ewanchew's complaint, the City determined that there had been some inappropriate conduct on the part of Terry and Silverman. The City reprimanded both Terry and Silverman for that conduct on June 26, 1990, imposing a choice of disciplinary action in the form of suspension without pay or forfeiture of annual leave. Terry and Silverman forfeited 160 and 40 hours of annual leave, respectively.

DISCUSSION

Faragher's Title VII Claim (Count I)

Courts recognize two theories under which plaintiffs may pursue Title VII claims for sexual harassment: (1) quid pro quo; and (2) hostile environment. Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989). "Quid pro quo harassment occurs when an employer alters an employee's job conditions as result of the employees refusal to submit to sexual demands." Id. Hostile environment sexual harassment occurs when an employers conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

In her Title VII claim, Faragher does not appear to be alleging a quid pro quo cause of action. Faragher alleges only one incident related to her job conditions; namely, a statement by Terry that she would be cleaning toilets for a longer period of time than was normal for new lifeguards. In support of its motion for partial summary judgment, the City has presented an exhaustive analysis concerning the legal sufficiency of a quid pro quo claim predicated on this sole allegation. Faragher has not challenged the City's arguments. Therefore, the Court addresses Faragher's Title VII claim only in terms of the hostile environment theory.

The elements of a prima facie case for hostile environment sexual harassment are: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the

harassment complained of affected a "term, condition, or privilege" of employment; and (5) respondeat superior; i.e., the employer knew or should have known of the harassment in question but failed to take prompt remedial action. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982). The City seeks a judgment as a matter of law on the grounds that, given the undisputed facts, Faragher cannot establish the respondeat superior element of the prima facie case. There are two methods by which a plaintiff may prove this element of a hostile environment theory. "The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." Henson, 682 F.2d at 905. See also Sanchez v. City of Miami Beach, 720 F. Supp. 974, 981 (S.D. Fla. 1989). The City argues that Faragher cannot prove either actual or constructive knowledge on the part of the City.

It is undisputed that Faragher did not complain to higher management in the City's Parks and Recreation Department regarding Terry and Silverman's alleged conduct. Indeed, the first such complaint was made by Ewanchew in her April, 1990 letter to the City's personnel director. Two months after Ewanchew's letter, the City imposed disciplinary action on Terry and Silverman. Faragher argues that the City had earlier actual knowledge of Terry and Silverman's alleged harassment through Ewanchew's complaints during her tenure to lifeguard captain Robert Gordon. Faragher does not claim, however, that Gordon was a member of higher management in the City's Parks and Recreation Department. Therefore, the Court rejects Faragher's attempt to impose earlier actual knowledge on the City

through Gordon.[1]

The Court next examines the constructive knowledge prong of the respondeat superior element. Upon receipt of Ewanchew's letter, Personnel Director Bender initiated an investigation into her allegations. After interviewing various female employees assigned to the Marine Safety Division, including Faragher, Bender concluded that Terry's and Silverman's alleged conduct rose "to the level of hostile environment for female staff." (Exhibit #5 to Deposition of Richard Bender.) In affidavits proffered by the City in support of its motion, two of the employees previously interviewed by Bender, Janice Chisesi and Kathy Buhr, deny any knowledge of sexual harassment on the part of Terry and Silverman. (Exhibits #8 and 9 to City's Notice of Filing Deposition Excerpts and Affidavits.) Rather than establishing the City's lack of constructive knowledge, these affidavits create a genuine issue of material fact regarding the pervasiveness of Terry and Silverman's alleged harassment.[2] Just as Bender concluded through his investigation that Terry and Silverman's conduct created a hostile environment for females, a fact finder could determine that Terry's and Silverman's alleged harassment was sufficiently pervasive to support an inference of constructive knowledge on the part of the City regarding such conduct. Consequently, the Court finds that the City is not entitled to judgment as a matter of law on Faragher's Title VII claim.

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[1] Faragher also argues that, even if the City did not have actual knowledge of Terry's and Silverman's alleged conduct until April, 1990, the City failed to take prompt remedial action or that the action taken was ineffective. The Court need not address these arguments in light of its constructive knowledge analysis, which follows.

[2] At a minimum, the affidavits create an issue of credibility for the fact finder.

Faragher's and Ewanchew's Negligent Retention and Supervision Claims (Counts VI and VII)

"Negligent retention of an employee occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with the employee that indicate his unfitness, but the employer fails to take further action, such as investigation, discharge, or reassignment." Tallahassee Furniture Co., Inc. v. Harrison, 583 So. 2d 744, 753 (Fla. 1st DCA 1991), rev. denied, 595 So. 2d 558 (Fla. 1992) (citing Garcia v. Duffy, 492 So. 2d 435, 438-39 (Fla. 2d DCA 1986)). This actual or constructive notice requirement applies equally to claims for negligent supervision. M.V. v. Gulf Ridge Council Boy Scouts of America, Inc., 529 So. 2d 1248, 1248 (Fla. 2d DCA 1988). In support of its motion for summary judgment on these claims, the City advances the same lack of notice arguments that it raised regarding the Title VII claim. Because the Court has found that genuine issues of material fact exist regarding the City's constructive knowledge for purposes of the Title VII claim, the Court concludes that the City is not entitled to summary judgment on the negligent retention and supervision claims on notice grounds.

The City further argues that Faragher and Ewanchew's negligent retention and supervision claims must fail with regard to Silverman because the plaintiffs have not alleged an underlying tort as to him. See Walsingham v. Browning, 525 So. 2d 996, 998 (Fla. 1st DCA 1988).[3] Faragher and Ewanchew concede that an employer's liability for negligent retention and supervision requires wrongful conduct on the part of the

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[3] As previously noted, both plaintiffs have asserted claims for battery against Terry.

employee. They offer two reasons why the Court should not grant the City's motion on this issue. First, Faragher and Ewanchew claim that they have alleged tortious conduct on the part of Silverman in the form of "violations of Title VII and violations of both plaintiff's [sic] constitutional rights to equal protection." (Plaintiffs' Response to Defendant City of Boca Raton's Motions for Summary Judgment: Counts I, VI and VII, D. E. # 106, at 19.) This alleged tortious conduct, however, derives from federal, rather than state law. Faragher and Ewanchew fail to provide any legal basis for the proposition that the tortious conduct requirement for their state law claims may be satisfied in this novel fashion. The Court, therefore, rejects the first of plaintiffs' arguments.

Alternatively, Faragher and Ewanchew argue that the City's negligence is "negligence per se," arising from the City's violation of the Equal Employment Opportunity Commission's sexual harassment regulations. Again, the plaintiffs offer no legal authority in support for this proposition. Moreover, the plaintiffs' arguments that the City is negligent for its own acts still does not satisfy the requirement of pleading an underlying tort on the part of the employee in order to assert a cause of action for negligent hiring and supervision of that employee. The Court, therefore rejects the plaintiffs' second argument. Because the plaintiffs have not alleged the required wrongful conduct on the part of Silverman, the Court concludes that the City is entitled to judgment as a matter of law on Faragher and Ewanchew's claims for negligent retention and supervision of Silverman.[4]

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[4] In light of this determination, the Court need not reach the City's additional argument regarding Ewanchew's failure to satisfy Florida's "impact rule" with regard to her claim for negligent
(continued...)

CONCLUSION

Based on the foregoing considerations, it is hereby

ORDERED AND ADJUDGED that:

(1) The City's motion for partial summary judgment as to Count I is DENIED.

(2) The City's motion for partial summary judgment as to Counts VI and VII is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to Faragher and Ewanchew's claims for negligent retention and supervision of Silverman. The motion is DENIED in all other respects.

DONE AND ORDER in Chambers, at Miami, Dade County, Florida this 26th day of April, 1994.

/s/ _____
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

---

[4](...continued)
retention and supervision of Silverman.

CASE NO.: 92-8010-CIV-HIGHSMITH

BETH ANN FARAGHER and
NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a
political subdivion of the
State of Florida; BILL TERRY,
individually, and DAVID
SILVERMAN, individually,

Defendants.

_____/

ORDER ON PARTIES' POST-TRIAL MOTION FOR ATTORNEYS' FEES AND COSTS

THIS CAUSE came before the Court upon the following post-trial motion for attorneys' fees and costs:

(1) Defendant City of Boca Raton's motions for attorneys' fees and costs (D.E. #172 and 173), and supplements thereto;

(2) Defendant Bill Terry's motion for attorneys' fees and costs (D.E. #174, Parts 1 and 2);

(3) Plaintiffs Beth Ann Faragher and Nancy Ewanchew's motions for attorneys' fees and costs (D.E. #169 and 175), and supplements thereto.

THESE MATTERS were referred to United States

Magistrate Judge Stephen T. Brown. A Report and Recommendation, dated March 7, 1995, has been filed.

Upon a *de novo* review of these matters, as well as consideration of Defendant City of Boca Raton's objections to the Magistrate Judge's Report and Recommendation it is hereby

ORDERED AND ADJUDGED that United States Magistrate Judge Brown's Report and Recommendation be, and the same is

RATIFIED, AFFIRMED and APPROVED in its entirety.

Accordingly, it is further

ORDERED and ADJUDGED that:

(1) Defendant City of Boca Raton's motion for attorney's fees and costs (D.E. #172 and 173), and supplements thereto, are DENIED;

(2) Defendant Bill Terry's motion for attorneys' fees and costs (D.E. #174, Parts 1 and 2) is DENIED;

(3) Plaintiffs Beth Ann Faragher and Nancy Ewanchew's motions for attorneys' fees and costs (D.E. #169 and 175), and supplements thereto, are GRANTED IN PART as follows.

(4) Plaintiff Beth Ann Faragher SHALL RECOVER the sum of $51,841.25 in attorneys' fees from Defendants City of Boca Raton, Bill Terry, and David Silverman, jointly and severally.

(5) Plaintiffs Beth Ann Faragher and Nancy Ewanchew SHALL RECOVER the total sum of $8,169.42 in costs, with one-half of the total apportioned to each plaintiff. Plaintiff Faragher's portion of the costs award, $4,084.71, shall be taxed jointly and several against Defendants City of Boca Raton, Bill Terry, and David Silverman. Plaintiff Ewanchew's portion of the costs award, $4,084.71, shall be taxed against Defendant Bill Terry.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 27th day of March, 1995.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Brown
Peter J. Hurtgen, Esq.
William R. Amlong, Esq.
Stuart A. Goldstein, Esq.
Michael A. Burke, Esq.

EXCERPTS FROM TRIAL

DAY 1
JUNE 21, 1994

TESTIMONY OF NANCY EWANCHEW

Direct by Amlong
Page 39, lines 5-6; Page 40, lines 4-8; Page 42, lines 21-25; Page 43, lines 1-6

COURT	State your full name, please, ma'am
A	Nancy Ewanchew Oakland
Q	And did you previously work for the City of Boca Raton as an ocean lifeguard?
A	Yes, sir.
Q	Okay, And do you recall when you started?
A	Yeah, it was April 22, 1987, I believe.
Q	Approximately, how many lifeguards worked for the City of Boca Raton when you first went to work there?
A	I believe there were approximately 20 a day.
Q	And how many of those were men and how many of those were women?
A	There were six women, I believe.

Q Okay. Can you name them?

A Beth Faragher, Jamie Harrington, Kelly Evans. Gail and I came later in my employment, and so did Betty Leen, I believe I'm forgetting a few of them but I just don't recall at this moment.

Page 45, lines 15-25; Page 46, 47, 48, lines 1-25

Q Now, after you began working at the City of Boca Raton, and you told us that initially you got along well with Mr. Terry. Did there come a time at which Mr. Terry acted or spoke to you, acted towards you or spoke to you in what you considered to be an inappropriate manner?

A Yes.

Q All right. Please tell Judge Highsmith about the first such incident that you recall.

A It was probably within the first week and he came up to me and put his arm around me and pulled me real close to him. And I moved away as quick as I could. And I — and also he, I was having a problem, I was going to get married and the marriage didn't work out and I decided that it wasn't a good idea. And I mentioned something to one of the girls that was present there, quietly. And then I guess he overheard it and said loudly in front of everybody in the headquarters — and there were a lot of people there — well, men just don't marry a girl like you.

COURT I'm sorry. Move that microphone over just a little bit toward me. Now what was the last remark you made?

A Bill Terry said that men don't marry a girl like me, that guys don't marry a girl like you is what he said.

COURT All right.

Q And how long, how soon after that, how soon after you became an employee did that happen?

A It was approximately a month.

Q Okay. Were there other incidents in which Mr. Terry spoke to you in a manner that you considered to be inappropriate?

A Yes. He, many times — it was like once a week or once every two weeks he would say something either under his breath or directly looking at you, saying, you know, that this girl on another beach patrol is a C-U-N-T and that a beach patron that was a friend of mine that I used to walk on the beach with once in a while, he said that she slept with all of the male lifeguards and that she was a slut. And that she was, you know, wasn't, shouldn't be around here and cause trouble.

I heard him make derogatory remarks about the other women. And it was behind their back that he would say it. But he would look right at me and say as if he was directing it at

me.

Q Miss Ewanchew, I know that you don't like some of these words, but you need to be more specific than to simply say that he made derogatory remarks. What precisely did Mr. Terry say about other women on the beach patrol?

A He would call them, he would call them cunts and sluts and bitches and he would just say that they shouldn't be out there and that they didn't have a right to work there. And when a promotion came up, I can explicitly remember him saying, That bitch would never get the job, I would never hire her.

And it was like once a week that you would have to hear that kind of garbage. And he would touch you and put his hands on you and reach towards you, your breast in a crowded room right behind people that were standing there, he would reach around and laugh at — I'm sorry. I apologize. I'm sorry.

Q Did you ever hear Mr. Terry make similar, did you ever hear Mr. Terry refer to male lifeguards by any slang for male genitalia?

A No.

Q Did you ever hear Mr. Terry comment on the promiscuity of any male lifeguard?

A No.

Q Now, other than the woman on the beach patrol, did you ever hear Mr. Terry make similar comments about and/or to women who weren't on the beach patrol?

A Yes.

Q Okay. Who? And what were the circumstances and what did Mr. Terry say?

A One of the lifeguard's wives came by the beach patrol often.

Q Who was that?

A Janet Yard (phonetic). And he called her a big mouthed bitch and called her a slut, and there was another girl, that girl I spoke of earlier, her name is BJ.

Q Was that the friend you would walk with?

A Yes.

Q How about a woman by the name of Sonya, do you recall Mr. Terry making any, do you know who Sonya was?

A I didn't know her personally, and I had never met her before. And the first time I ever heard of her was I heard Bill say, She's the cunt on the other team. And there is no way that she will win the race. And he was talking about her as a competitor. And I didn't even know her.

Page 49, lines 1-7 and 20-25; Page 50, lines 1-25

Q What kind of teams are we talking about here?

A Competition team.

Q For what?

A Lifeguard tournaments.

Q And was Sonya the only person that Mr. Terry characterized that way during lifeguard competitions.

A No.

Q Do you recall any other lifeguard competitions other than the one involving Sonya in which Mr. Terry commented upon the women opponents?

A I heard him make general statements towards the women's teams of other beach patrols, I heard it a couple of times.

Q What kind of general statements, what words?

A That we'll beat the bunch of bitches.

Q To whom did he make these statements?

A I believe he made them to a couple of the lieutenants.

Q To whom did he make the statement about Sonya?

A I believe that there was a beach patrol captain present. I think it was Pat McGowan or Rich Morrison.

Q Was it within hearing of, well, obviously you heard it?

A Oh, everybody heard it that was standing in the outer office.

Q Okay. Do you recall who was standing in the outer office? Were there any women?

A Yes, there were a lot of women there. Beth was there and I believe possibly Jamie heard it, but I'm not really sure.

Q Did you ever hear Mr. Terry make any comments about Elizabeth or Betty Leen, that's L-E-E-N?

A Yes. He said that she had big tits and when God was handing out tits the that she was at the head of the line.

Q Do you know whether or not he said this — well, to whom did he say this?

A He said it in a general ear shot of everybody that was standing there in that morning.

Q Was Miss Leen there?

A Yes, she was.

Page 51, lines 1-25; Page 52, lines 1-25; Page 53, lines 1-22

Q Do you recall a woman by the name of Kendra, K-E-N-D-R-A?

A I didn't know her personally, but I heard her referred to as a bitch.

Q And there was a lifeguard there named Eddie Wright?

A Yes.

Q And he had a girlfriend named Joan?

A Yeah.

Q What, if anything, did Mr. Terry say about Mr. Wright's girlfriend Joan?

A That she was, that she slept around and that she was sleazy.

Q What, if anything, did you hear Mr. Terry say about Beth Faragher?

A He said that she was man like and that she didn't have a chest.

Q And did Mr. Terry ever comment on the physique of male lifeguards?

A No, sir.

Q Did you ever hear Mr. Terry make any remarks

about your friend Kelly Evans?

A I don't remember him saying anything but I do remember him touching her all the time.

Q How would he touch her?

A He would pull her in real, grab her on the shoulder and pull her in real close and put his hand around her waist and grab her butt. And she was visibly upset by that.

Q Visibly upset is a conclusion. Tell Judge Highsmith what you saw her do, how did she act.

A She would scrunch her face up and move away and push away at him. And he would just hold on to her and laugh and look at her and laugh. Like it was funny.

Q Did you ever hear Mr. Terry make any remarks that you considered to be inappropriate about Jamie Harrington?

A I don't believe he said anything. I do recall that he referred to her as a bitch sometimes, but he touched and grabbed at her all the time, too.

Q How about Gail Nye?

A They called her an array of names. She was called a bitch, a slut, a cunt, a clit.

Q When you say they, who is they?

A Well, David Silverman and Bill.

Q Now, when you worked for the beach patrol did you get annual personnel evaluations?

A Yes.

Q And do you know whether or not your annual — did you get any annual pay raises?

A I believe so.

Q And do you know whether your pay raises were a function of your annual personnel evaluation?

A I believe they were.

Q And if you got a good evaluation you would get a pay raise?

A Yes, sir.

Q And who performed your job evaluations?

A Bill Terry.

Q And Mr. Terry hired you as well, correct?

A Yes.

Q Now, when you were employed there, I believe during the entire time, David Silverman was a lieutenant, correct?

A Yes.

Q And did you consider David Silverman to be your boss?

A Yes.

Q And tell Judge Highsmith why you thought that Mr. Silverman as a lieutenant was your boss?

A He told me point blank that in the tower one day that it was real rough, he says, well, you will be making the rescue because I'm your boss. Referring to the fact that he didn't want to go in the water and get wet and that because I was the junior guard that I would be responsible for making any rescues. That I had seen him make supervisory and disciplinary decisions to people, to other lifeguards. And basically he had input on the evaluations as well.

Page 54, lines 2-25; Page 55, lines 9-25; Page 56, 57, lines 1-25; Page 58, lines 1-22

Q Did there come a time after you began working for the City of Boca Raton at which Mr. Silverman, at which Mr. Silverman spoke to you in what you considered to be a sexually inappropriate manner?

A Yes.

Q How long after you met him did that — how long after your first meeting with Mr. Silverman did that occur?

A It was within a week. It was within a week of starting.

Q Where did the first incident take place?

A I believe at headquarters.

Q Do you remember what Mr. Silverman said to you?

A I don't recall exactly what he said at the time.

Q Were you alone with him?

A We were in the headquarters and there were a lot of people around and he was making jokes about the girls on the beach, jokes like, you know there are so many girls on the beach today and there are so many tits on the beach today, and that if it was a rainy day —

Q Right now, Miss Oakland, I'm trying to confine you to the first meeting. Did he say all of these things during the first meeting?

A No.

Q Okay. What, if anything, do you recall about what Mr. Silverman said during the first meeting?

A I believe it was a statement about tits, something about tits:

Q Do you generally refer to your breasts as tits?

A No, sir.

Q Tell Judge Highsmith what other remarks that you recall David Silverman making that you considered to be sexually inappropriate?

A I heard him say what he used all the time when it was going to rain, if it was a 40 percent or a 30 percent chance of rain, he would say, oh, it's a 40 percent chance I'm going to get a blow job today.

And he mentioned, when I say — well, when he was my lieutenant and I had to sit with him all day, he talked about his sexual conquests with a beach patron that was drunk, and how he had sex with her in the back of his truck. And another lifeguard watched through the window. And I had to sit there and listen to all day his descriptions of what he did with this drunk.

And he often tried to get me in conversations, sexual type conversations. And one time he brought up that term helmet and I didn't know what it was, I didn't know what he was talking about. And I said, What's that? And then he went into a big description about, oh, it's the head of my, of my penis, and do you want to see him, and do you want to see my helmet.

And he bugged me about that for a long time after and he referred to the women that I worked with in real derogatory terms, using words, you know — he said about Betty Leen, he made fun of her breasts and how, made fun

of her and said that she hung out of her bathing suits and that she looked funny when she ran, that she bounced all over. And made fun of her.

And he made fun of Beth Faragher and said that she had a flat chest, and made fun of her about that. And said she had a tight ass. And I had to sit there and listen to him when he would come to my tower. And a girl would be sitting on the beach and he would describe beach patrons and say about their body. And he said a lot of things that were very inappropriate on almost a daily basis when I worked with him.

He would say things when you would be in the shower and pound on the door. And say that he would want to take a shower with you. And he said it to the other girls, too. And when he pounded on the door, he would shake the door handle and I was afraid he was going to come in.

And there were — we took showers, ended up getting a lot of girls to go in the shower at the same time because we were afraid that one of these days that door was going to open and we didn't know what was going to happen. Because he sounded crazy outside the door, saying he wanted to get — he said so many things that, so often, that it was disgusting.

Q Did you want Mr. Silverman to tell you about his sex life?

A No, sir.

Q Did you want Mr. Silverman to tell you about his member?

A No.

Q Did you want to listen to the, to Mr. Silverman's critique about the physiques of other women?

A No.

Q You told us that these comments would be made when he would come and sit with you in your lifeguard tower. What was Mr. Silverman doing coming to sit with you in your lifeguard tower?

A He was my lieutenant and he would make rounds on the beach and sometimes he would sit with you for a certain amount of time and say, you know, what he would call visit with the peach on his beach.

And other times I was scheduled to sit with him and be the second guard at a tower. And I'd have to sit there all day with him.

Q Did you ever tell Mr. Silverman that you did not enjoy this?

A Yes.

Q What did you tell Mr. Silverman, what adjective did you use?

A I told him he was disgusting.

Q What response, if any, did Mr. Silverman make?

A He laughed.

Q Did you ever observe Mr. Silverman engage in any pantomime?

A At the headquarters.

Q All right. And I don't want you to do it, but I want you to tell the judge what Mr. Silverman was doing at the headquarters.

A He was making faces like he was doing oral sex to a woman.

Q What sort of facial movements was he engaging in?

A Sticking his tongue out and licking in the air.

Q Who saw him do this?

A I saw him and I know there were other people, but I didn't look around to see who was looking.

Q Were there other women there?

A I believe there were.

Q Were you amused.

A Absolutely not.

Page 65, lines 11-24; Page 66, lines 5-25; Page 67, lines 1-25; Page 68, lines 1-6, 11-25; Page 69, lines 1-4

Q Now, when you worked for the City of Boca Raton, did you ever complain to any of your superiors there about the conduct of Bill Terry and David Silverman?

A Only one person and that was Flash, Robert Gordon.

Q And what job did Robert "Flash" Gordon hold at the City of Boca Raton?

A I believe he was in a position of either a lieutenant or a captain, but he was a superior of mine.

Q And do you recall any of the particulars of your complaint?

A I told him that the behavior from both David Silverman and Bill Terry was very offensive to me and I wanted him to see if he could do something about it or try to stop it or tell them to stop it. And I asked him what I should do.

Q What, if anything, did Mr. Gordon tell you at that point?

A He told me that the City didn't care and that just to basically just to stick it out.

Q Did you complaint to him again?

A Yes.

Q And what was the second complaint about?

A It was of the same nature and the same type of thing going on. And I couldn't understand why he couldn't do something, being a supervisor.

Q Do you recall a third conversation with Mr. Gordon during which you complained?

A Yes.

Q What was that about?

A It's the same. The same thing. I wanted him to do something about it and he said that I can't do anything, I'm powerless, that the City doesn't care and that there is nothing that can be done, and just to stick it out.

Q In addition to your complaining to Mr. Gordon, do you know if Mr. Gordon ever saw or heard any of the incidents of which you have told us?

A Oh, yeah. He definitely saw and heard.

Q Incidents involving Mr. Terry?

A Yes.

Q Incidents involving Mr. Silverman?

A Yes.

Q When Mr. Terry would touch you —

A He saw when he put his arm around me and around my waist, and that I moved away quickly and was very upset. We used to actually try to avoid Bill Terry. And we would try to dodge him. When we would know he would be standing at a certain place, myself and the other women would try to go to the other side of the room and avoid crossing his path.

Q Did you ever hear any other woman complain to Mr. Gordon, to Captain Gordon about Mr. Terry's behavior or Mr. Silverman's behavior?

A Yes.

Q Whom did you overhear complain?

A I overheard Jamie Harrington. And I overheard Beth.

Q What did Captain Gordon tell Ms. Harrington?

A Basically, what he told me, that there is nothing he could do.

Q What did Captain Gordon tell Beth Faragher?

A I believe it was the same thing he told all of us.

Q Did you complain to the other women about the treatment you were getting from Mr. Terry

and Mr. Silverman?

A At first we didn't go up to each other and say we're being sexually harassed or something, because we didn't really know what that term meant. We knew that we were being treated in a way that wasn't right and that made us feel uncomfortable. And through that, most of the woman began wearing towels around themselves and going into the shower room together and avoiding both gentlemen at all costs. And trying to be around —

Q Miss Oakland, why did you personally simply not go down to City Hall and say these people are talking dirty and grabbing me?

A I would have been fired. I believe I would have been fired.

Q Why do you believe that?

A I had seen over the years, over these two years that I worked there, incidences where when somebody — for example, on Janet Yard. When her husband was upset at how Bill Terry spoke to his wife he put them on bad towers.

Q Who is he and who is him?

A He put Bill, Bill Terry put Bob Yard at bad stands where they didn't have proper sun protection or missing a wind screen. And would put them on the undesirable, like a shift that he didn't want to be on. Because they had a morning shift and a late shift. And I saw him

do that to other people. Using his supervisory capacity to punish people if they did something that he didn't like. So I felt sure that I would have been fired if I went there.

Page 71, lines 10-25; Page 72, lines 1-15

Q Miss Ewanchew, did you eventually come to write to the City of Boca Raton a letter concerning what had happened to you on the beach?

A Yes.

Q And when did you do that?

A In April of '90.

Q What prompted you to write the letter to the City of Boca Raton a year after you had left?

A After I had left I heard there was still things going on on the beach patrol. By things I mean inappropriate language and behavior. And I heard that from Beth. And also I remember one time when I was in Publix, Vicki Bonner, which I really didn't know who she was except that she worked for the City as a lifeguard, came up to me and was visibly upset and crying. And wanted to talk about the harassment that was going on out there and what was happening to her.

So after those two incidents from Beth and from Vicki, and then just the fact that I really felt that something, somebody should say

something about it so that it stops, I wrote the letter.

Q How long were you on probation for at Palm Beach County?

A One year.

Q Did you write the letter after you got off probation?

A Yes.

Q What concerns, if any, did you have about Mr. Terry speaking ill of you to your new bosses?

A I was very concerned because I had heard from when I worked at the City of Delray that a supervisor, he had come and spoke to a supervisor and told him that I was a poor employee and that I didn't report to work on time and things like that.

Page 77, lines 12-22; Page 78, lines 2, 4-6, 10, 25; Page 79, lines 1-4

Q When you first came to work for the City of Boca Raton, Miss Oakland, what, if anything, were you told about the City's policy on sexual harassment?

A When I was hired, nothing.

Q Did there come a time later when you were told what the City's policy on sexual harassment was?

A I don't recall ever being told anything.

Q During, during the two years that you were employed by the City of Boca Raton, Miss Oakland, what, if anything, did the City do to affirmatively raise with you, or any other employees that you know of, the subject of sexual harassment?

A Nothing.

Q During those two years, Miss Oakland, what, if anything, did the City of Boca Raton do to express to you and other employees its strong disapproval of sexual harassment?

A Absolutely nothing.

Q Miss Oakland, during the two years that you worked there, what, if anything, did the City of Boca Raton do to let you know about your rights to raise and how to raise the issue of sexual harassment?

A It did nothing.

Cross by Hurtgen
Page 82, lines 18-25; Page 83, lines 1-13; Page 87, lines 20-25; Page 88, lines 1-2; Page 93, lines 1-5

Q Well, it's hard to describe banter. Take the word banter out. Did the men and women with whom you worked use sexual terms in a joking or light way in a fashion that you found not - offensive?

A Yes.

Q And that would generally occur in the vicinity of headquarters and/or the locker room, correct?

A Yes.

Q That's where most of you as groups were, isn't it?

A Yes, at certain times of the day.

Q Right, I understand that. And if I understand what you have told us before, you yourself participated in that good natured sexual joking from time to time, correct?

A I don't know what you mean by participated in it.

Q Well, did you use such words in the conversations yourself?

A What words?

Q Any words relating to the sexes, sexual conduct, attitudes about sexual relations, anything having to do with teasing or joking amongst men and women as it relates to sex?

A Yes, I did.

Q Well, that's the question. Offensive to you. That is sexual remarks by Mr. Gordon that you found to be offensive. And your answer is no?

A No.

Q But you did hear him make sexual remarks?

A Yeah, he may have once or twice.

Q Okay. But that you didn't find them offensive?

A No.

Q All right. When you commenced your employment with the City you received an employee handbook, is that right?

A Yes.

Q And you signed a receipt for that, do you recall that?

A Yeah.

Cross by Burke
Page 127, lines 21-25; Page 128, lines 1-6

Q Okay. And then the bulk of the work day, that is the time that you are spending out there in the tower watching the ocean and the beach patrons to make sure that things are proceeding as they should, you would not have contact with Mr. Terry, isn't that true?

A Yes, but we still had contact with him.

Q Well, sometimes he would come by the stand, true?

A True.

Q During the course of your two years of employment that happened about 12 times, correct?

A Approximately.

TESTIMONY OF JAMIE SUE HARRINGTON

Direct by Amlong
Page 132, lines 17-23; Page 134, lines 1-4, 12-25; Page 137, lines 1-25; Page 138, lines 1-22

Q Good afternoon, Miss Harrington. My name is Bill Amlong, I represent Nancy Ewanchew and Beth Faragher. You worked for the City of Boca Raton as an ocean lifeguard from February 1986 through December 1991?

A That's correct.

Q And most of that time you were part-time?

A Yes.

Q Did you ever hear Mr. Terry make any remarks that you considered to be sexually inappropriate about any of the women lifeguards?

A Yes.

Q Let me direct your attention to a time when, do you remember a lifeguard by the name of Vicki Bonner?

A Yes.

Q And do you recall an instance when Miss Bonner left the headquarters — when you are in the tower you have a radio, right, so you can keep in contact with headquarters and the lieutenant?

A Yes.

Q And do you recall an incident during which Miss Bonner left the headquarters without her radio?

A Yes.

Q And do you recall Mr. Terry commenting on that?

A Yes.

Q Would you — and this was within your earshot?

A He said it directly to me.

Q Please tell Judge Highsmith what Mr. Terry said about Miss Bonner leaving without her radio?

A He said, I can't believe the stupid cunt forgot her radio.

Q Now, do you recall him ever making any other unflattering remarks about women lifeguards?

A Yes.

Q Would you please tell us what they were.

A I remember after a competition that I competed in this other lifeguard from a different beach patrol, Sonya Booth was her name, and I beat her by just about five seconds, I guess. And he said, The bitch almost got you.

Q Do you mean generally, in your conversations with Mr. Terry, would you refer to women as cunts and bitches?

A Can you please repeat the question?

Q I said when you had conversations with Mr. Terry that you initiated, did you generally refer to women as either cunts or bitches?

A I refer to them as that?

Q Yes. Did you?

A No.

Q Do you consider those to be inappropriate words for reference to women?

A Yes.

Q Do you recall an incident when you appeared for work and the day was rather chilly and you had a conversation with Mr. Silverman that morning at headquarters?

A I don't recall that particular day, but I do recall a day coming to work, I mean, when I've had a conversation with him.

Q And did Mr. Silverman make any remarks about your appearance on that rather chilly day?

A That it must be cold out because my nipples were showing. Maybe not in those exact words, but reference to my nipples were showing because it was a cold day out.

Q Did you generally prefer to discuss your nipples with Mr. Silverman?

A No.

Q Did you consider Mr. Silverman to be your boss?

A At one time, when I was employed with the City, yes, I did, yes.

Q Tell the judge why you considered Mr. Silverman to be your boss; what, if anything, did he ever say to suggest that he was your boss.

A Well, the way it was said, the City was set up, I was considered an ocean lifeguard, when I was working he was considered a lieutenant. And at that particular time the lieutenants, there was like a lieutenant that was assigned to, I'm not sure exactly how many lifeguards, but for a particular day a lieutenant was your

boss for that day or your direct supervisor for that day. And you know, if you had a problem or something, you would call him first. So I would consider him to be my supervisor for the day.

Q Did you ever hear Mr. Terry — I'm sorry. Did you ever hear Mr. Silverman make any other remarks — strike that. Let me ask, did you consider the remarks about your nipples to be inappropriate?

A Yes.

Q Did it make you feel uncomfortable?

A Yes.

Q Did you ever hear Mr. Silverman make any other remarks about women that you simply felt were inappropriate and that made you feel uncomfortable?

A Yes.

Q Could you please tell the judge about them?

A I remember one time when he was my lieutenant and we were sitting in a tower together.

Q Why was he sitting in the tower with you?

A Oh, I'm sorry, well, because sometimes lifeguards and lieutenants would sit in the same lifeguard towers together.

Q So he was sitting with your because he was your lieutenant?

A Yes. But we could also be sitting in the same area, I could have been in a different lifeguard tower but he still would have been my lieutenant for the day.

Q But he is with you that day because he is your lieutenant, and what happens?

A Well, during my eight-hour shift I would sit with him for about six hours, because I'd have an hour lunch, and at this particular incident I recall we were sitting there and he was eating some food and a woman walked by and he said, Oh, I'd love to eat between her legs.

Q Did that impress you as being an appropriate comment for him to make?

A No.

Q Had you ever discussed oral sex with Mr. Silverman?

A Not that I recall, no.

Q Did that make you feel uncomfortable?

A Yes.

Q Now, you were something of a star on the lifeguard team, correct?

A I guess you could say that, yes.

Q And you got some publicity concerning that?

A Yes.

Q And do you recall a conversation with Mr. Terry during which Mr. Terry suggested how or why you possibly had gone gotten such publicity?

A Yes, I remember a reporter from the Boca News had done a story about me and Mr. Terry asked me if I had slept with him.

Page 139, lines 19-25; Page 140, lines 1-8, 16-24

Q Did you consider it to be okay that Mr. Terry was asking you whether or not you were sleeping with a reporter?

A No, I didn't.

Q Did you ever voluntarily discuss your sex life with Mr. Terry?

A No.

Q Did there come, did there ever come a point when Mr. Terry touched you in a way that you felt was not appropriate?

A Yes.

Q Would you please tell Judge Highsmith about that incident?

A I remember one time when I was standing in

the lifeguard room and I was getting ready to punch out, punch my time clock out, and he put his hand like on my thigh and I punched him in the arm and I said, What are you doing? And he walked away in the office after that.

Q Did you ever complain to — do you know a lifeguard, a former lifeguard captain by the name of Robert Flash Gordon?

A Yes.

Q Did you ever complain to him, Captain Gordon, about the inappropriate sexual behavior of Messrs. Terry and/or Silverman?

A I don't remember complaining to him, no. I might have mentioned things that were said or happened, but I don't remember formally complaining to him.

Cross by Hurtgen
Page 141, lines 8-14; Page 142, lines 1-25; Page 143, lines 1, 22-24

Q The remarks that you have told us about from Mr. Silverman that you found offensive all occurred while he was a lieutenant, is that right?

A Yes, that's correct.

Q And I believe you have said that when he became a captain he cleaned up his act, is that right?

A Yes, that's correct.

Q Did you ever talk with any of the other women lifeguards while you were employed there about these instances of offensive words that you have told us about?

A Yes.

Q Okay. And with whom did you discuss it?

A It was, I guess, after, I guess, the City had started making inquiry about what was going on.

Q After Nancy Ewanchew wrote to the City to raise the question, is that right?

A That's correct.

Q Okay. And there came a time when you were interviewed by Mr. Bender, the personnel director, is that right?

A Yes.

Q Okay. And do you recall whether that occurred in, sometime in June of 1990?

A I can't remember but that's probably about right.

Q All right. Did the first time that you discussed it with anybody else besides Mr. Bender, when you did, was that at a meeting at Nancy Ewanchew's apartment?

A Yes.

Q Okay. And that was after Nancy had left, correct?

A Yes.

Q All right. Prior to that time at Nancy's apartment did Nancy or any other women lifeguards tell you there had been any touching or offensive words by Terry or Silverman?

A Not that I can recall.

Q Did you enjoy your work for the City as a lifeguard in those five years that you were working there?

A Yes.

A Yes.

Cross Examination by Burke
Page 144, lines 6-24; Page 145, lines 7-19

Q Afternoon, Miss Harrington. My name is Michael Burke. With respect to this incident where Mr. Terry in referring to Miss Bonner, called her a stupid blank, Beth Faragher and Nancy Ewanchew were not present, correct?

A Yes, that's correct.

Q With respect to the time wherein Mr. Terry touched your thigh and you punched him any [sic] in the arm, Beth Faragher and Nancy Ewanchew were not present, correct?

A Correct.

Q Now, Mr. Terry didn't do that again, I take it, after you punched him in the arm?

A No.

Q You were not disciplined following that in any way that you felt was unfair, correct?

A That's correct.

Q You never told Mr. Terry on these occasions wherein he used these vulgarities in your presence that you were offended and wished him to stop using that language, that's correct?

A That's correct.

Q Nancy Ewanchew Oakland never complained to you that Mr. Terry had harassed her in any verbal or physical way; is that correct?

A To the best of my knowledge, that's correct.

Q She did not make such a complaint to you?

A Yes.

Q Same question with regard to Beth Faragher, during the occasions when you spoke with one another Beth Faragher never complained about Terry in terms of sexual harassment, correct?

A Correct.

Q From what you could see Nancy Ewanchew and Beth Faragher enjoyed their work at the City of Boca Raton, correct?

A Correct.

Cross Examination by Goldstein
Pages 146, 147, lines 1-25; Page 148, lines 1-10; Page 149, lines 5-18

Q Miss Harrington, my name is Stuart Goldstein, we've met before. I represent David Silverman. I just have a few questions for you. With regard to the approximately comment that you attribute to Mr. Silverman about your nipples, can you tell us about when that occurred?

A I can't specifically pinpoint a date. I know it was when he was a lieutenant. It definitely wasn't when he was a captain. So I can't, I don't want to just throw out a date and say well, it could have been this date.

Q Can you pinpoint a year?

A '89, '88.

Q But you are not sure?

A No, I'm not sure.

Q Whenever it occurred, were either Miss Faragher or Miss Oakland then Ewanchew present?

A No.

Q And the comment that you attribute to Mr. Silverman would be the beach patron that walked by, or the woman that walked by, can you tell us when approximately that occurred?

A Again, I can't think of a specific date.

Q Just approximately.

A Approximately '88, 1988.

Q But you're not sure?

A But I'm not sure of that, no.

Q Were either Miss Faragher or Miss Ewanchew present?

A No.

Q Was that a tower also?

A Yes, that was a lifeguard tower.

Q So these two incidents occurred approximately within a year of each other?

A Yes.

Q As best you can recall?

A As best I can recall, yes. Within a year.

Q And you don't remember complaining to

acting Captain Gordon about either of these incidents?

A No, I do not.

Q Did you consider him your friend?

A Yes.

Q And he was an acting captain at the time?

A I believe so. Our training, my understanding, I thought he was a training officer.

Q All right, but there were captains —

A Yes.

Q — that you could have gone to, if you wished, to complain about this? Could you have asked a captain to —

COURT Excuse me, was that a question?

GOLDSTEIN Yes, it was your Honor.

COURT All right. There were captains that you could have gone to and complained about this; is that correct?

WITNESS Yes, that's correct.

COURT All right. Next question

Q And I gather that you didn't complain to any captain about either of these incidents?

A No, I did not.

Q Or to anyone else?

A Any of the incidents described?

Q The two that you just described and that I have asked you about.

A No.

Q You testified a moment ago that after Mr. Silverman became a captain he, to use your term, cleaned up his act. What did you mean by that?

A Well, he just seemed like, I mean, I didn't hear him say anything comments or any, like I had testified earlier, I didn't hear him say anything with reference to my nipples after that. I mean, he just seemed like he was going by the book and that's what I mean by cleaning up his act.

Q Isn't it true that other than the two incidents that you have referred to that you didn't hear Mr. Silverman say anything derogatory in a sexual way about or toward women other than these comments to yourself?

A Nothing I can recall, no, to the best of my knowledge, no, I can't remember anything specifically.

TESTIMONY OF ROBERT FRANK GORDON

Direct by Amlong
Page 152, lines 24-25; Page 153, lines 1-19, 24-25 Page 154, lines 1-11, 25; Page 155, lines 1-25; Page 156, lines 1-12

Q Now, during the time that you were employed by the City of Boca Raton as a marine safety captain, did any of the female lifeguard ever complain to you about what they characterized as being inappropriate, sexually inappropriate language?

A They did not use those specific words, but they complained about language and actions.

Q Okay. Who complained?

A Practically all of them that were working there at the time.

Q Jamie Harrington who just walked out, did she complain to you that you recall?

A Yes.

Q Nancy Ewanchew?

A Yes.

Q Beth Faragher?

A Somewhat, yeah.

Q Gail Nye?

A Yes.

Q Vicki Bonner?

A I don't remember specifically any comments from her, no.

Q What did Ms. Nye complain to you about?

A She complained about a number of things; specifically that there is one that I remember vividly.

Q All right, would you please tell Judge Highsmith about that?

A That she was working in the tower with Mr. Silverman one day and he had asked her to join him in the back of his vehicle at lunch time.

Q Please — I realize this is a formal setting and I realize you are somewhat uncomfortable with this language, because of your conduct during the deposition as well. But please tell Judge Highsmith exactly what words Miss Nye quoted Mr. Silverman as using to her?

Q Mr. Gordon?

A Specifically she said that he had invited her at lunch time to go back to his truck so that he could lick her clit.

Q As a marine safety captain you ranked immediately below Bill Terry, correct?

A There were two, two other captains and I believe, well, I'm not certain, I was a captain and training officer. There may have been again myself and the chief.

Q But you were a supervisor?

A Yes.

Q And Mr. Gordon, as a supervisor, what was your understanding about your responsibility as the, as a marine safety officer, a marine safety captain and training officer, if a subordinate complained to you about sexual harassment?

A No one had ever complained about sexual harassment to me. I never heard the word before this came up.

Q Okay. Well —

A But compliance of the nature of what we're talking about, my responsibility would, I suppose, be to try and resolve it.

Q Did the City of Boca Raton ever — the City of Boca Raton made sure that you knew how to swim, right?

A Yes.

Q And there were other tasks that you had to know to do, correct?

A Yes.

Q And you were tested on these tasks to make sure that you were competent to do them, correct?

A Correct.

Q And there were certain things that the City had. Well, for example, did the City have an insurance program, health insurance?

A Yes.

Q And did somebody from the City explain that to you?

A Yes.

Q Did the City have a retirement fund?

A Yes.

Q And did somebody from the City explain the pension plan to you?

A Well, we received pamphlets about whatever.

Page 157, lines 3-25; Page 158, lines 1, 10-12

Q What did the City tell you that you should do if a woman employee came to you and said, This guy is talking dirty to me, he is talking about sex? What were you supposed to do?

A I did not go to the City with the complaints from the ladies.

Q What did the City tell you that you were supposed to do if a woman employee came to and said, This guy had been groping me?

HURTGEN: Objection; he's asked and answered that questions.

COURT Well, I'm not sure.

A They never told me anything.

COURT Excuse me. Let me ask you a question, Mr. Gordon. Did you ever receive any instructions whatsoever about what you should do in the event any employee made a complaint to you about anything?

A Instructions, yes, from, in the form of how to write and the order of disciplinary action record cards.

COURT All right. You may proceed.

AMLONG Thank you.

Q Did you ever write a disciplinary record card on any of the complaints that you told us about from Gail Nye, Beth Faragher, Nancy Ewanchew?

A I did not record any of those, I didn't think it was my place to record card or discipline a supervisor.

Page 158, line 25; Page 159, lines 1-6, 12-25; Page 160, lines 1-7

Q Do you recall what conversation, if any, Miss Faragher said accompanied the tackle?

A Not specific words, but to the point that she had nice legs and ass but really no chest to speak of.

Q Do you recall when you gave your deposition Mr. Gordon and being asked what Mr. Faragher said to you?

A Yes.

Q Do you recall giving this answer: One thing probably I wouldn't forget, one morning she came up crying and she said that Captain Silverman had thrown her down in the sand and told her that if she had tits he would do her in a minute?

A Yes.

Q Did Miss Ewanchew ever complain to you about being touched?

A Miss Ewanchew complained probably more than any of the other women on the patrol, and her complaints were ranged from — everything, I couldn't remember them all. But she complained about language and being — I know she didn't like to be touched, period. But several times she complained about being touched.

Q When you say that she complained about everything, this trial is about matters sexual, sexual language and sexual touchings.

A I'm talking about she complained about language, she complained about some people only remember language and never complained about being touched. For her I seem to remember she was, I think that she was both verbally and physically harassed.

Page 160, line 25; Page 161, lines 1-25; Page 162, lines 1-23

Q Did Elizabeth Lee [sic] complain to you?

A Yes.

Q What would Miss Leen complain to you?

A Cracks about the size of her breasts language.

Q Did Miss Leen ever attribute to Mr. Silverman the use of any slang language in reference to her breasts?

A Yes.

Q What did she say he called them to her?

A Tits.

Q Did she appear to be happy that he had referred to them that way?

A No.

Q What, if anything, did you tell women lifeguards who complained to you, as we've just listed them, about whether or not they should go higher than Mr. Terry and take these complaints to City Hall?

A Well, I pretty much left that decision to them. But advised them that in the past there have been times when going to City Hall wasn't as productive as we had hoped it would be.

Q Do you remember during your deposition, Mr. Gordon, and Mr. Hurtgen this is on page 28 beginning at line 5: Question: You told Mr. Hurtgen that you had spoken to the women who had complained to you about taking their complaints about sexual harassment higher than Bill Terry. Did you advise them to do that?

Your answer was: I told them to pursue the sexual harassment issue was their ball. It was their game. I only advised them that in the past it seemed to some people, myself, others that have been with the City for years and years, and that they need to be careful.

Do you recall that testimony?

A Yes.

Q Does that refresh your recollection as to what you said during the deposition?

A Yes.

Q Does that refresh your recollection as to what you actually told Nancy Ewanchew and Beth Faragher and the others?

A Yes.

Q And did you tell them to be careful about going to City Hall?

HURTGEN Objection, asked and answered.

COURT Sustained.

AMLONG Your Honor, I was only trying to get that in as substantive testimony as opposed impeachment.

COURT Yes, well, in an abundance of caution — I understand his testimony, I understand his testimony to be that, yes, what he said in the deposition. Is that correct?

A Yes, that's correct

COURT Very well.

DAY 2
June 22, 1994

TESTIMONY OF ROBERT GORDON

Cross by Hurtgen
Page 2, lines 19-25; Page 3, lines 1-7; Page 9, lines 3-25; Page 10, line 1-21

Q The matters that you told us about yesterday

that some of the women lifeguards discussed with you were matters that you never personally witnessed; is that right?

A That's correct.

Q Okay. You never heard Mr. Terry or Mr. Silverman use offensive words, sex-type related words directed at those women in your presence; is that right?

A That's correct.

Q Okay. And you never saw any touching by Mr. Terry of any of the women lifeguards of an offensive nature, is that right also?

A That's correct.

Q You even spoke to Mr. Alexander, the director of the department, didn't you?

A Yes, I did.

Q Indicating that you thought it was wrong for the City to promote Silverman; is that correct?

A That's correct.

Q Okay. And prior to Silverman's promotion, you were his supervisor, weren't you?

A Yes.

Q All right. While you were his supervisor, did it ever come to your information from one of the

women lifeguards that Silverman was using inappropriate language in their presence?

A I believe so. I couldn't say with certainty.

Q All right. If it did come to your information, did you have any responsibility for correcting Silverman, counseling him, doing anything to cause him to not say those things?

A It would have been my responsibility to —

Q Okay. Did you do that?

A I don't believe so.

Q Did you tell anybody about Silverman, or yourself at the time with the City about Mr. Silverman's -- what was being said to you about his abusive words?

A I can't remember who I would have told.

Q Well, do you remember telling anybody is the question?

A In that time frame, I can't be sure.

Q All right.

I am not asking, sir, about any information you provided once the City began to investigate, I am not talking with after Ewanchew's letter, I am talking about prior to that when you were a Captain and Silverman was still a Lieutenant within your area of

responsibility.

Did you tell anybody at that time that you were hearing from some of the women that David Silverman was using raw, inappropriate language?

A I don't think I did.

Q Okay.

Was it also in 1990 when Ms. Ewanchew told you the things that you have told us about concerning the inappropriate language by Mr. Terry or Mr. Silverman?

A I believe it was.

Page 11, lines 23-25; Page 12, lines 1-15; Page 14, lines 11-25; Page 15, lines 1-25; Page 16, lines 1-24

Q When you were the training officer and captain, did you normally attend the morning workouts?

A Yes.

Q Okay. In fact, on most occasions, you were the planner and conductor of them, weren't you?

A That's correct.

Q And they were generally group activities, weren't they?

A For the most part.

Q. All right. Did you ever here [sic] Silverman or Terry say anything derogatory or sexually offensive about women in any of those morning workouts that you conducted?

A No, I didn't.

Q Did you ever see either – strike that.

Did you ever see Mr. Terry touch a woman lifeguard in an inappropriate way during the morning workouts?

A No.

Q You also spoke to Sandy Diello, didn't you?

A Yes.

Q Who was Sandy?

A I believe she was the Superintendent of Parks.

Q She was Mr. Terry's immediate boss; wasn't she?

A Yes, she was.

Q All right. And she came to the beach on regular occasions, didn't she?

A Regular, no.

Q Well, on occasion?

A On occasion.

Q All right. And you spoke with her when she — on those occasions that she came to the beach, didn't you?

A Yes.

Q And that is more than once?

A Yes.

Q All right. And you complained to her about that matter affecting the lifeguard world at that time, too, didn't you?

A Yes.

Q All right. Did you ever say anything to her concerning the complaints you had heard from some of the women lifeguards about Silverman's language?

A No.

Q All right. Why didn't you?

A I don't know.

Q Is it that while you thought it was inappropriate, it wasn't so frequent or severe or common or regular that it didn't merit taking it to that step?

A I know that initially I thought that, you know, we all used inappropriate language from time to time.

Q Okay. It was hard to know when that line got crossed, wasn't it?

A Right.

Q Because you did use yourself, even joking, teasing language that had sexual overtones to it, didn't you?

A Yes.

Q And a lot of other lifeguards did, too, didn't they?

A Most all of them.

Q All right. David Silverman did, didn't he?

A David?

Q David Silverman did, didn't he?

A I believe so.

Q All right. Did other persons touch the shoulders or the back of other lifeguards while you were employed there?

A We carried each other out. I don't know what you —

Q Well, were there familial touches, putting arms around shoulders, pats on the back?

A Yes.

Q An occasional pat on the fanny of somebody who just performed well in a swim, or something?

A Certainly.

Q And you didn't consider those to be offensive then, did you?

A No.

TESTIMONY OF VICTORIA BONNER

Direct by Amlong
Page 27, line 25; Page 28, lines 1-2, 12-13, 23-24; Page 29, lines 17-25; Page 30, lines 1-2, 14-25; Page 31, lines 1-2; Page 32, lines 19, 24; Page 33, lines 2-10, 17-23; Page 34, lines 1-6

COURT: Would you state your full name and your last name, please?

WITNESS: Victoria F. Bonner, B O N N E R.

Q And you previously worked for the City of Boca Raton as an ocean lifeguard?

A Yes.

Q Would you please tell Judge Highsmith what Mr. Terry said to you on the day you started?

Q As I was finishing up my interview, as I was walking out the door, he said, so, are you going to — the "F" word — or screw all the guys like the rest of the girls? I don't remember if it was

the "F" word or —

COURT I'm sorry. I can't hear.

WITNESS I can't remember which derogatory word it was. It was somewhere like those lines.

Q You interpreted that as a question to mean were you going to have sex with the other male lifeguards?

A Yes.

Q Do you recall an instance during which someone asked you to go into Mr. Terry's office and retrieve a pencil?

A Yes.

Q And who asked you to go into the office and get a pencil?

A To the best of my knowledge, Flash.

Q Meaning Robert Gordon whom you just saw walking out of here; right?

A Yes.

Q And when you walked into Mr. Terry's office, what if anything did Mr. Terry say to you that you considered to be inappropriate?

A It is not exactly what he said to me, as what I was told he said as I was walking out the door. I didn't actually hear him say the word, but I

was told by my lieutenant Scott Hall that he —

Q What did Mr. Hall tell you that Mr. Terry said of you?

A Scott Hall told me that Mr. Terry called me a cunt.

Q Did there ever come a time when Mr. Terry touched you in any way that you felt was not appropriate?

A Yes.

Q Would you please tell Judge Highsmith — was that once or more than once?

A One time.

Q Would you tell Judge Highsmith, please about the time that he — that Mr. Terry touched you in a way that you felt was not appropriate?

A I was at the time clock. I don't remember if I was punching in or punching out. Bill Terry came by and slapped me on the upper thigh. It wasn't a hard slap, he just came by and — like that. And that was it.

Q Did you enjoy that?

A No.

Q Did you disenjoy that?

A I did not enjoy that.

Q Did you find it to be offensive?

A Yes.

Q During the time that you were employed by the City of Boca Raton, did any of your superiors ever inform you of your rights as they relate to sexual harassment?

A No.

Cross by Stutin
Page 35, lines 7-19; Page 36, lines 7-9, 20; Page 37, lines 1-19, 21-25; Page 38, line 16; Page 39, lines 17-19; Page 40, lines 9-14

Q While you were working as a lifeguard on the beech [sic], what was the general environment like that you worked in? Describe the locker room for me.

A Very gross. The locker — there was no privacy for females. There was one bathroom, and — just the locker room was very small, and the lockers were very close together.

Q Okay. And the relationship amongst the lifeguards, was it friendly or —

A Yes.

Q Okay. And you did some socializing outside of work?

A Yes.

Q And you have also described one incident where Mr. Terry came and gave you a tap on the thigh?

A Yes.

Q He didn't hit you hard, did he?

A No.

Q Just a little tap?

A Right.

Q And then went on his way?

A Yes.

Q Was his hand on your leg for one second, that's it?

A (Nodding head in the affirmative.)

Q Okay. And were there any other instances like that by Mr. Terry where he touched your?

A No.

Q And were there any other instances by any other lifeguard where they touched you in some way you found offensive?

A Other lifeguards touching me?

Q Other lifeguards touching you.

A No.

Q And these two verbal instances and the one touching, did you discuss those with any of the other female lifeguards prior to Nancy Ewanchew raising the issue?

A I don't remember who I discussed it with. If I did, if I didn't, I don't remember.

Q And do you remember ever complaining to someone in City management?

A No.

Q Did you ever witness any statements that you would consider vulgar or offensive being made towards another female lifeguard, something you heard that was not directed to you?

A No.

Q And that is true for everyone; Bill Terry, you didn't hear any from him directed toward another female lifeguard?

A You were just asking me did I hear of Bill Terry saying anything to any of the other female lifeguards that was offensive; right?

Q Correct.

A No. I didn't hear anything, no.

Q Okay. At any other lifeguard. Is that true for all the lifeguards?

A I don't remember hearing any other lifeguards saying anything.

Q Okay. And did you ever see Bill Terry touch any other female lifeguard?

A No.

Q Did you have any problems at all David Silverman while you were employed as a lifeguard?

A No.

Q Did you voluntarily go to Dick Bender or personnel after this meeting to complain about these incidents that you have explained to us?

A Did I go to complain about this?

Q Did you, yes. Did you go to Dick Bender after?

A No.

TESTIMONY OF KATHRYN BUHR

Direct by Stutin
Page 45, lines 5-7, 16-25; Page 46, lines 1-11

Q Would you state your full name and spell your last name, please, ma'am?

A Sure. Kathryn Buhr, B U H R.

Q And did you at any time work the City of Boca Raton in the Marine Safety Section?

A When I was first hired.

Q And when was that?

A '89. November, '89.

Q And how long were you at the Marine Investigation section?

A Until September, '90.

Q All right. And what were your duties there?

A At Marine Safety headquarters?

Q Yes.

A Answer telephone, typing, payroll, clerical work.

Q And what was your normal work week?

A Monday through Friday, 8:00 a.m. to 5:00 p.m., with an hour lunch.

Q During the period that you were working Marine Safety, was Bill Terry the chief?

A Yes.

Q And was David Silverman there?

A Yes.

Page 48, line 25; Page 49, lines 1-17

Q And do you recall while you were working there ever hearing Bill Terry use offensive or vulgar terms of sexual nature?

A No.

Q And how about David Silverman, did you hear any foul language of a sexual nature from him?

A No.

Q Did you ever observe Bill Terry touch any of the female guards while you were there?

A No.

Q You didn't see him touch anyone's thigh or buttocks?

A No.

Q Did you yourself experience any touchings by Bill Terry?

A He leaned on my shoulder, and I only remember this because of what I was given to read. He leaned on my shoulder on occasion to put things in a basket that was on the desk, an in-basket, a work basket, and he kind of rubbed my neck on one occasion. It was a long time ago.

Cross by Burke
Page 52, lines 21-25; Page 53, lines 1-8

Q Am I correct, then, that you did not see Mr.

Terry touch any of the female lifeguards in any way that you found or observed to be inappropriate?

A No, I did not.

Q All right. And you did not hear Mr. Terry use any vulgar language directed towards women during the period of time that you worked with him?

A No, I did not.

Q And so that Judge Highsmith clearly understands this, you worked in the office with Mr. Terry day in and day out; correct?

A When he was in the office, yes.

TESTIMONY OF NANCY EWANCHEW

Cross by Goldstein
Page 87, lines 9-25; Page 88, lines 1-25; Page 89, lines 1-8

Q Good morning, Ms. Oakland. I ask you to excuse me in advance by calling Ms. Ewanchew today.

You testified yesterday that you had seen Mr. Silverman make supervisory decisions and disciplinary decisions regarding other lifeguards. Could you tell the court, please, any particular lifeguard whom you recall specifically about whom Mr. Silverman made supervisory disciplinary decisions?

A Yes.

Q All right.

Go ahead please.

A I saw David Silverman reprimand people both verbally and when he said that he wrote people up, and he told me when I was sitting in the tower with him, that I am the boss and I can do what I want to do.

Q That is not my question ma'am. My question is, for you to tell us the name of a lifeguard who you recall Mr. Silverman made disciplinary decisions about that you observed?

A No, I did not. I don't have any — I don't recall any names of anyone.

Q And you also said that he had input on evaluations. Do you recall that testimony yesterday?

A Yes.

Q Isn't that true, that — isn't it true that that was only when he was a captain?

A No, I believe as a lieutenant he had input on the evaluations.

Q And you say "I believe," so you are not really sure then?

A He led me to believe that he had input.

Q How did he do that?

A By telling me.

Q When did he do that?

A When I sat in the tower with him?

Q When was that?

A Numerous times.

Q And how did the conversation come up, that he led you to believe that he had input on employee evaluations?

A One day there was a really big surf, the day I brought out before about you have to make rescue because are the junior guards, in that same conversation I vividly remember that he said you better do a good job because I am rating you, and I — I understood that to mean rate me on my evaluation.

Q But you don't really know then that was within the purview of his duties as a lieutenant to have input on employee evaluations, in the formal employee evaluation form?

A We weren't allowed to know exactly what anyone did out there.

Page 93, lines 9-25; Page 94, lines 1-14

Q Now, Ms. Oakland, when you became employed by the City of Boca Raton, did you receive an employee handbook similar to this one that I am holding up?

A Yes.

Q It contained, did it not, provisions regarding probationary employees — I'm sorry, the probation period for employees?

A I believe it did.

Q And the probationary period for you was 180 days, wasn't it, back when you started?

A I am uncertain of that.

Q But you did understand from reading this book that after your probation period was over, you had access to the union's grievance procedure, did you not?

A Yes.

Q And you also understood from reading this book that you had access to the civil service process, did you not, if you had a complaint about something?

A I believe there was a civil service board in place. I felt uneasy about making any kind of attempt to complain about anything.

Q But you understood the process was there available to you?

A I believe that it was a process that was there set up, but I didn't really feel that it was there for me.

Q Did you know who the members of the Civil Service Board were at the time?

A No.

Q Well, did you think they had it in for you or if you complained to them you wouldn't get a fair hearing?

A No.

TESTIMONY OF BETH FARAGHER

Direct by Amlong
Page 124, lines 17-25; Page 125, lines 1-25; Page 126, lines 1-4

Q And did you previously work for the City of Boca Raton?

A Yes, I did.

Q Doing what?

A As an ocean lifeguard.

Q Okay. And when did you start?

A I believe it was in September of 1985. I believe it was September 26.

Q Okay. Was that your primary occupation at

the time?

A No. I worked as a lifeguard part time while I was attending college at FSU.

Q Is there a difference between a part time employee and what is known as a classified employee?

A Yes, there is.

Q What is that?

A A part time employee is — it is my understanding that they didn't have any protection. Their hours were more flexible. They didn't have guaranteed hours at the beach. They didn't get any benefits, like health insurance or any pension plans. We didn't get sick time or vacation time, you know any benefits like that.

And classified employees were basically guaranteed 40 hours a week. They worked full time. They got benefits, you know, including insurance. I think there might have been a pension plan. And it was, basically, my understanding that they had protection against being fired, you know.

Q To your understanding, did you have any protection against being fired? Did you have any civil service protection?

A No. None.

Q When you went to become a lifeguard, who hired you?

A I put in an application, and I went down to take a test. I believe the test was conducted by Bill Terry. I believe a couple of the captains were there. I think Rich Morrison was there, and Pat McGowan, and I believe Flash Gordon or Robert Gordon helped conduct the test.

Page 127, lines 4-25; Page 128, lines 1-25; Page 129, lines 1-13; Page 131, lines 22-23

Q Now, when you were at the City of Boca Raton, did you have any personnel valuations [sic]?

A I had personnel valuations [sic]? I don't recall if mine were annual. I think — they seemed sporadic to me.

Q Did you know who did those?

A I believe Bill Terry was in charge of those.

Q And what, if anything, did you understand these evaluations — or how often they might be — to have anything to do with your pay raise — pay rate?

A Basically, I believe that any and all raises were solely based on the evaluations.

Q What other authority, if any, did you think that Mr. Terry had over you?

A Basically, he had complete authority over me.

As a part time employee, I didn't have any protections. So if he wanted to fire me, it was my understanding that he could fire me.

Q Did you ever receive any oral reprimands?

A I don't recall if I received oral reprimands. I think the City's policy was to do most of their reprimands in writing, or maybe document them and still call them reprimands. But I remember a lot of paper work, and I did receive some of those.

Q And from whom did you receive some of those?

A Mostly Bill Terry.

Q Do you remember what they were for?

A I remember a few. I think one — I had forgotten to punch out, so I received, you know, an oral reprimand. I'm not sure, counsel, what they were called.

Others, I think — one day I came in and looked up at the tower assignment, say that, you know, I was at one tower. That sometimes got changed while we were working out. I didn't look again before I went out to my tower, so I ended up going to the wrong tower. And I am sure there were others, but, you know, right now, I don't really recall what they were.

Q When you were hired, did you meet David Silverman?

A Yes, I did. I don't remember if he was there when I took the test, but I met him afterwards.

Q And what was Mr. Silverman's job at the time?

A When I got hired, Mr. Silverman was basically a Marine Safety Lieutenant.

Q And did you consider Mr. Silverman to be your supervisor?

A Yes, I did.

Q What did that supervision involve?

A As a lieutenant, he would be basically supervisor of the beach that he was on that day. There are three beaches in Boca Raton. They had usually one scheduled to each beach, so anything on the beach that happened that day had to be reported to the lieutenant before we even called downtown, or down to headquarters.

Q Okay. Did a lieutenant have disciplinary authority over an ocean lifeguard, as you understood it?

A Yes.

Q And did you ever receive any in writing from the City saying who your first-line supervisor was?

A I believe I did. I believe that there was a memo sent out by the City saying that

lieutenants were our immediate supervisors.

Q And from whom was that memo?

A I believe it was from Bill Terry.

Page 133, lines 9-25; Page 134-135, lines 1-25; Page 136, lines 1-14, 22-25; Page 137-142, lines 1-25; Page 143, lines 1-2

Q Ms. Faragher, how often did you come in contact with Mr. Silverman?

A As a part time employee, I only worked at least — for about the three or four years I was on the beach, I usually just worked weekends, and then, you know, school breaks. So it seems that Mr. Silverman worked a lot of the same times I did. So in the beginning, I probably saw him two to three times a week, or worked with him two to three days a week.

Q Did you get along with Mr. Silverman to begin with?

A Yes, I did.

Q And did Mr. Silverman ever ask you to go out?

A Yes, he did.

Q Did you go out with him?

A I — actually, he asked me many times, and then one time I decided to go out with him as what I thought would be, like, a friend

relationship.

Q Okay. Tell Judge Highsmith what you all did.

A He came up to my house, picked me up. I think we went — I think we went to basically a pub in the old Boca Mall; I can't remember what the name of it was. Had a beer. And then I think before we went home, we stopped at Dirty Moe's in North Boca for a beer, and he drove me back to my house, which was right across the street.

Right before I tried to get out of the car, he tried to kiss me, and I basically pulled away. And, you know, I don't remember what I said, but then, you know, left the car and went inside.

Q Did Mr. Silverman continue to ask you to go out with him?

A Yes.

Q Did you wish to go out with him after that?

A No.

Q How early in your relationship with the City was that one outing.

A I can't say specifically, but it was probably within the first six, seven months of starting there.

Q Now, did there ever come a time when you

worked for the City in which Mr. Silverman spoke to you in a manner that you considered to not be appropriate?

A Yes.

Q Would you tell the judge about the first such incident that you can recall?

A Okay. I don't have the timing of the incident, you know, completely set in my memory, but I do remember a specific incident, and I am not saying if they are in order.

I remember one time, I think it was at beach headquarters, Mr. Silverman said something — I can remember the first part of the statement, not the last part. He said something, like, "Faragher, if your breasts got any firmer," and then he went on. I can't remember what he said after that, but, basically, he made a comment about the size of my breasts.

Q Had you offered your breasts to be critiqued?

A No. Not at all.

Q How did you feel when Mr. Silverman offered his opinion of your breasts?

A I felt embarrassed. Kind of, like, hurt. Disgusted. Basically, very belittled.

Q Had anybody in a work place environment ever before discussed your breasts?

A Never.

Q Can you recall any other instances?

A Many. And, again, I can't remember specific dates or, you know, years. You know, I can probably try to narrow it down. Another time I remember him making the comment, something, like, "nice ass."

Q Did you ever offer your rear-end to be critiqued by Mr. Silverman?

A No, I did not.

Q How did you feel when he commented upon that?

A Basically, the same kind of belittled, degraded, embarrassed.

Q Where did the "nice ass" comment take place?

A I believe during that incident, I was walking up the steps to headquarters, and he was walking behind me.

Q Do you remember an incident in which — was there ever any physical contact between you and Mr. Silverman?

A Yes, there was a couple of incidents. I believe the first one was in, maybe, my first year on the beach. I had been —

It was during a morning workout. I believe I

was coming back from a beach run, had run north on the beach, and had come back. I think it was in front of Tower 5, which is in South Beach Park.

Basically, Mr. Silverman came up to me, or he was running — I don't remember which direction, came up to me and tackled me into the sand, you know. Basically, you know, full body tackle into the sand, and I believe he said something, about, you know — I can't recall the specifics of what he said.

Q Did you ever tackle Mr. Silverman?

A No.

Q Have you ever been tackled by anybody at work?

A No.

Q What was the other touching incident?

A The other incident was — I believe the circumstances were similar. It was a morning workout. I had run down to — it was the Old Tower 10. It was about a mile north of the beach. I think it is Tower 12 now.

Right before I got to the tower — I should explain a little. There is a boardwalk that goes up from that tower and back into the park. It is maybe 100 to 150 yards long. Basically, he came up to me — I think he ran up to me, grabbed me around the waste[sic], threw me

over his shoulder, and proceeded to kind of run up the boardwalk with me over his shoulder.

And I kept saying, "Put me down. Let me go. Put me down." And he was laughing, and continued all the way up into the park with me on his shoulder.

Q Did Mr. Silverman ever say anything to you involving dating arrangements?

A Many times. He oftentimes mentioned —

Q Was this within the dating arrangements? Has everything that we have been talking about been within four years of the lawsuit for the two touching incidents?

A I am sure there are some bathing incidents that occurred before, but there are certainly bathing incidents that occurred — I guess that would put it in January of 1988. So, definitely, it would be the incident that occurred after that.

Basically, Mr. Silverman would often propose to me, usually after a morning workout, that I join him in the shower. Sometimes it would be at the outside shower, showering next to him. He would make comments about, "Hey, come on over and join me."

There were also incidents inside the headquarters. That was the only hot shower, basically, we had access to. There is one

bathroom.

Many times he would say, you know — he would be in the bathroom taking a shower, and say, "Come on in," or he would be heading in there and say, "Come on in."

And there are incidents where he would — where we would go — or, you know, sometimes it is me alone. Sometimes it was myself with, you know, maybe one, two, a few of the other female lifeguards, go into the bathroom to shower, and would, basically, hear catcalling out in the hallway saying, "Hey, let me come in and take a shower with you."

After a while, we, you know — I would go in there sometimes and lock the door, you know, if I was in there by myself. But, you know, in the beginning, I didn't do that, because there is one hot shower, and there was only a limited time for a person to shower. So in the beginning, I didn't do that. So he would come in or say stuff in the hallway.

So later on, we would go into the bathroom together, myself and some of the female lifeguards, and lock the door. So, basically, we could take a hot shower in peace. But oftentimes, even when that happened, Silverman would be banging on the door saying, you know, "Hey, let me come in and shower with you." That happened many times.

Q Other than the women — other than the

women banding together over the shower issue, was there any other sort of — for lack of a better word — heard behavior that the lifeguards documented?

A Yes, there was after, you know. Comments were made, physical things were done to us. And I know the other females started doing this. I started doing this too.

Even if we had the just had showered, we would throw a towel around ourselves to cover ourselves, or throw on one of our uniforms, even though they were still wet, throw on an old gray t-shirt and red shorts just so we wouldn't, you know, be standing there in our bathing suits, because we didn't — I didn't like, you know, making myself any more obvious than was necessary. So I tried to cover myself up to avoid unwanted comments and touching.

And other things I would do — and I think some of the other females would do this, during morning meetings — there is a locker room — there is a locker room behind the little foyer, the secretary called it, and most people would stand in the foyer during the morning meeting.

A lot of times — my locker was right inside the locker room door. I would stand in the locker room so I could, you know, hear the meeting, but just avoid being in the same small room close to Bill Terry and David Silverman. I would stand away or back in the corner to

avoid coming close to them.

Q Do you recall any conversations with Mr. Silverman involving a weather forecast that called for a likelihood of rain?

A I recall Silverman — Mr. Silverman making comments about, if there is 30, 40, 50 percent chance of rain, that there would be similar percentage change that he would get a blowjob in he back of his truck that afternoon or that day.

Q Did he ever make comments similar to that directed specifically at you?

A Yes. Again, it was way more than one time. I can't give you an exact number, but I remember many times on rainy days — like, I mean, coming back from lunch.

And at the time, Mr. Silverman had — I don't even know what kind of — it was an old truck, but, basically, he had the back of it set up almost like a camper-type thing. He would have, like — I don't know if there was mats in there, or, like, down. He had put, like a TV in there. I think he had a TV there at some point. Basically, a comfortable little place.

Because when I first worked out there, there was no protection against rainy days, so I would come back from lunch, and he would be sitting in the back of his truck, and he would say, "Why don't you come join me for the afternoon," you know. I would be heading

back to my tower, and he would say, "Come join me for the afternoon in the back of my truck."

And, basically, you know, to me, he was insinuating join me in the back of my truck and have sex with him. And as I said, that happened, you know, more than once.

Q Did her ever specifically suggest that you join him in the back of a truck to have a sex act?

A I don't recall if he specifically said, "sex act," but he would often invite me lewdly to join him in the back of his truck.

Q Why do you say "lewdly"? What about his invitation struck you as being lewd?

A He would be smiling, and kind of excited, and raising his eyebrows, you know. That kind of behavior.

Q Other than talking about your firm breasts, did Mister — Did you ever hear Mr. Silverman — before I leave that, how did the shower comments make you feel?

A Basically, you know, I wouldn't know what to say. He was a supervisor, so I didn't want to, basically, get him really mad at me, because, you know, I didn't know what would happen if I did get him mad at me. But I felt, again, embarrassed, belittled, you know.

He would say — sometimes when other people

were around, I – you know, I don't want to be known as someone who, you know – just from his comments, as someone thought that we were involved.

He, you know, basically, lessened my self-esteem, you know. I felt like, you know, I had to be careful around him, you know, not even look at him, because then he would think that I was trying to lead him on, or something.

Q How about the invitations to his truck, how did you feel about the truck invitations.

A Again the same, like degraded, embarrassed, disgusted.

Page 143, lines 4-7; Page 144, lines 1-4, 11-15; Page 145, lines 4-25; Page 146, lines 1-25

Q Did any other woman lifeguards ever tell you that Mr. Silverman had asked her for sexual favors?

A Yes. I believe that Elizabeth Leen, Betty – as we called her –

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A Okay. I want to be sure about this. Someone told me – I am not sure if it was Elizabeth Leen, but someone told me that Elizabeth Leen had been propositioned by David Silverman to give him a blowjob in the back of his truck.

Q Other than the remarks about your breasts, did you ever hear Mr. Silverman discuss female breasts in any other context?

A Yes. When I was – when he was lieutenant, I would sometimes sit at the same tower with him.

Q He would come on rounds as a lieutenant?

A Yes. He would come on rounds to check up on the beach, to check up on the lifeguards. Basically, yes, doing his job as a lieutenant, and, you know, might join me in the tower for, you know, 15 minutes, half an hour, to check. Continue with the other –

Q Please.

A So, like, an occasion where I would be sitting with him in the tower, I would hear him make comments. And usually, you know, I was the only other person in the tower. Make comments about the breasts, either the size or the fact that he liked them of a beach patron that was probably sitting in front of us, you know, in that tower area.

Q Did Mr. Silverman use the word "breasts"?

A No. He would usually refer to them as tits, like, "She has nice tits," or that type of thing.

Q Did you ever hear Mr. Silverman use the words "tits" to describe a number for women?

A Yes, it was later on at the beach when I first started, there were only two female lifeguards, but after a couple of years, we had maybe from five to six lifeguards at one time.

It would be in beach headquarters, usually in the foyer area. We would usually come in, and the beach assignments for the day would be up. There are little tags with each lifeguard's name on it, and then lieutenants had a tag with a beach on the wall, and little hooks for where you were assigned that day.

I would hear by — he was then lieutenant, because this affected him. He would come in and look at the tower assignment and figure out how many females were on his beach. And I believe the incident overheard, there were three females on the beach, and, you know, he was kind of laughing, excited saying, "Oh, look, you know, I have six tits on my beach today."

Q How did that make you feel when you were on duty and Mr. Silverman was not talking about your breasts or your body parts, or asking you to engage in having sex with him, how did it make you feel when he commented on other women's body parts?

A It made me, you know — I would be embarrassed, because he was usually directing it at me, you know, and I don't refer to people like that.

I also felt, you know, disgusted, kind of — for

the fact that he was, you know — it seemed to me just degrading women, you know, as a whole, you know, just by the way he would refer to them. He never just — also disgusted me because of his lack of respect for women to refer to them in that manner.

Page 147, lines 5-7, 21-25; Page 148, lines 1-25; Page 149, lines 1-24; Page 152, lines 10-14 and 22-25; Page 153, lines 1-25; Page 154, lines 1-12

Q Now, I am going to switch focus on a moment to Mr. Terry. When you first went to work and you were hired by Mr. Terry, did you get along with Mr. Terry to begin with?

A . . . I would like to state, though, that, you know, they — soon after beginning work there, I heard things about Mr. Terry from some of the other lifeguards. Basically, negative things.

But this was a new job for me, and I was trying to, you know, say, well, these guys — well, they have their opinion. I am just going to give him the benefit of the doubt and go in with an open mind, with, you know, not a negative attitude towards him in the beginning. So in the beginning, I guess, you know, I did get along with him the little that I did see him.

Q Did there come a time when Mr. Terry acted or spoke to you in a manner that you considered — that you considered not to be appropriate?

A Yes. There were many touching incidents with

Mr. Terry. It just seemed, like, to me — when I was near him, he would be the type that, you know, would try to, you know, always touch, always touch, like, a female. He would grab me around the shoulders, grab me around the waist on one or more occasions.

At times, he would — I remember one incident specifically where I was sitting down, getting ready to go to a waitressing job that I had, and Bill Terry came over and kind of like patted the top of my thigh or patted my thigh and was rubbing it. I think that incident was in April of 1990.

Other incidents, he patted me on the butt or slapped me on the butt. I think that was probably when, you know, all I had on was a bathing suit. It wasn't, like, I didn't have shorts on, or anything.

Q How did it make you feel when Mr. Terry touched you?

A Basically, like, a piece of dirt. I felt like I was — I was almost, like, an object. I wasn't a human being. I was, like, an object there for not necessarily his pleasure, but there for him to do with what he wanted. I felt humiliated.

After a couple of incidents, just, you know, angry, frustrated, because I didn't feel like there was anything I could do about it, except like what I tried to do, you know, cover up, stand in the meetings in the corner, in the locker room. Avoid him, basically.

I remember on one occasion just being so angry and frustrated after an incident that I went down to the gym — and I can't even remember if I put on the gloves — this is after an incident with Bill Terry — just started, like, hitting on the heavy bag. Just take out some of my frustrations and anger.

Q About how many times in all did Mr. Terry touch you in ways that you felt were inappropriate?

A I can't remember a specific number. If I had to estimate, it would probably be between 15 and 30 times.

Q Spread throughout the course of your employment?

A Right. As I said, in the beginning, I didn't see him much, so it was usually, you know, later in employment, after, you know, I started working more.

Q Now, you mentioned that you said that you worked on the heavy bag and that you felt very frustrated because you didn't have anybody to complain to. Why did you not complain to somebody at City Hall and say, "These people are saying things and doing things to me that just aren't right"?

A Basically, I think I didn't complain because I feared retaliation if I did it. I felt like if I did complain, there was probably a good possibility that I would lose my job.

I had heard things. Basically, heard about people being retaliated against that had gone down to complain to City Hall, or — and I also had heard that, you know, even if people did go down to City Hall, basically nothing would happen because of it. It seemed like Bill Terry had absolute, like, control over the beach patrol and what happened there.

Q Did anybody with the City of Boca Raton ever tell you what the City's policy was about sexual harassment?

A The first time I saw the City's policy on sexual harassment was approximately May or June of 1990 after I had been out there for four years and eight or nine months. Before that, I had never heard and I don't recall seeing anything on the City's policy.

Q Under what circumstances did you see the City's policy?

A The City's policy kind of appeared after Nancy's letter was written. That is the first time that I truly got to read it. And, basically, when I read it, it was like — I thought that this is exactly what these men having doing to me.

And the City's policy said that, you know — I am not sure exactly what it said, but it said that is our policy, not to allow things like this to happen. And the first time I saw it was, as I said, in May of 1990. I know after Nancy's letter was written, somebody got a copy of it and I saw it then for the first time.

Q You realize now that you can't fire somebody because they complain about something that is made illegal under Title 7, don't you?

A Yes.

Q Did you realize that then?

A No, I didn't realize it. And just from my impression and working out there for a long time, it seems like Bill Terry could do things that, you know, if I had known it was wrong, do things that I thought were completely wrong and get away with it, because the City — or the people at City Hall would back him up or support him, and cover it and just let it be.

Page 155, lines 11-25; Page 156, lines 1-4, 20-25; Page 157, lines 1-13

Q Before we get to the session in Mr. Bender's office, did you ever witness Mr. Silverman engaging in any pantomime?

A Yes, I did. I don't remember the number of times, but I remember it was in beach headquarters. I think it was, you know, right before or after a morning meeting, but I remember him basically lifting his head up in the air and, like, looking, sticking his tongue out, and licking in the air as if he was performing oral sex on a woman.

Q Did he say anything at this point or did he just make the motions?

A I don't recall if he said anything. I do remember the motions, though.

Q How many people were around?

A I'm not sure. I would be making an estimate. Maybe six to twelve people were there.

Q Did this occur on more than one occasion?

A I remember one incident clearly. As to other occasions, you know, I don't recall if he did, but I do remember one incident clearly.

Q What, if anything, had you heard, Ms. Faragher, and from whom did had you heard it.

COURT Well, I'm sorry. I don't want to interrupt, Mr. Amlong. I want to move that along. Were you aware of the reputation of Mr. Terry in the department, all right, for sexual misconduct? Now, the answer to that question is "Yes" or "No."

WITNESS Okay. I have a question before I answer that.

COURT All right.

WITNESS Who do you mean in the department?

COURT I am talking about among the greater employees of not only the fire — the lifeguard unit, but city employees in general.

WITNESS Okay. Yes.

COURT All right. What was that reputation?

WITNESS Basically, Bill Terry had a reputation for making sexual advances on young teenagers. From what I had heard, it was often young softball girls that he coached.

Cross by Stutin
Pages 197, 198 lines 1-25; Page 199, lines 1-6

Q But you did — you were ready to come back and start working again in August of 1986?

A Right.

Q Okay. And then you worked at the City for another — until the following summer, though the school year?

A Yes.

Q And then, again, you took a summer leave of absence?

A Yes, I did go up that summer.

Q And then, again, you returned back to your job at the beach in the City — that would be '87?

A Yes. I am trying to figure out the years.

Q And then you did the same, you worked ~~th~~rough the school year, '87, '88. And did you graduate in 1988?

A Yes, I did graduate in April of 1988.

Q Okay. And did you take a job in a retail store of some kind after you graduated?

A Summer of 1988? I believe that I — I am not sure how long I went up for it. I believe I went to Ohio for part of the summer, returned to the beach patrol in, you know, August or September of 1988. I continued working at the beach patrol while I looked for a, you know, a job in my field, which was management. Obtained a job in a retail store and worked full time, and still worked occasionally on the beach.

Q. Okay. So you left working the beach the entire time that you eventually got a full time job at a retail store?

A Right.

Q And were you happy in that position?

A In the beginning, yes; but then, no. I resigned my position there.

Q And did you ask the City to come work at the beach full time after you resigned from your other job?

A I believe I did, yes.

Q Okay. So you left your beach job each summer for three summers, and then eventually came back and wanted to work there full time.

Did you — in any of these times that you came

back to the beach, did you look for another job anywhere else, or did you always want to come back to the beach?

A I don't believe that I did look for a job anywhere else. For the most part, I enjoined [sic] my job on the beach, and, you know, after those summers, did want to come back.

Q And you did, you kept working at the beach full time until you left to go to law school in June of 1990?

A It was — I don't recall the dates. I remember is was mostly full time, you know, maybe four or fives days a week, but it wasn't classified during that time.

Q Okay. And throughout this entire period, when you leave for two or three months, David Silverman worked at the beach the entire time and Terry worked the beach that entire time; is that correct?

A That's correct.

Page 202, lines 6-25; Page 203, lines 1-2

Q Do you recall this testimony for your deposition of June 11, 1992, on Page 164, at Line 13.

"Question: Did you ever hear any discussion about body parts in the locker room, meaning references to body parts?

"Mr. Amlong: Are you talking about Mr. Silverman?

"Mr. Goldstein: Just in the locker room in general.

"Amlong: Anybody?

"Goldstein: Yes. In the locker room by lifeguards.

"The Witness: Yes. I overheard, you know, statements of that sort.

"Question: What kind of statements did you hear?

"Answer: I don't recall what they were. I know I overheard things about that, though, from males and females. Again, maybe occasionally from a female, but since it was mostly guys, it was mostly from the males."

Does that refresh your recollection as to whether you did, in fact, hear males as well as females discussing such issues as body parts in the locker room?

A Like I said, I can't really recall now. That is my deposition. You know, maybe at that time I remembered a little bit more since it was two years earlier.

Page 203, lines 13-25; Page 204, lines 1-19

Q And would you describe the atmosphere in the

locker room as where kidding and joking and teasing each other, the lifeguards, would occur occasionally?

A Yes, it would occur occasionally.

Q And would some of that kidding, teasing, and joking contain sexual overtones?

A I am not sure, like, what you are addressing by "sexual overtones." Are you talking about, like, a male guard talking to another male guard, you know, about maybe something that happened with him?

Q I think I was asking these questions at the deposition, but your answer to that question at the deposition was, "Some of it, yes."

Does that refresh your recollection as to what was meant by kidding, teasing, joking, containing sexual overtones?

A You know, again, that is my deposition. I guess I probably would remember it more than, you know, some things.

Q Do you recall now that that atmosphere existed and whether or not you found it offensive?

A I believe that, you know, that atmosphere did exist to, you know, some extent, and, yes, I did find some of it offensive.

Q All right. Do you recall how you answered that

question on your June 11, 1992, deposition in that case, Page 64, Line 2?

"Question: Did you find any of the sexual teasing, joking, or kidding that others engaged in — did you find that offensive?

"Answer: No, I didn't."

A Okay. I guess you just refreshed my recollection.

Page 205, lines 8-25; Page 206, lines 1-9

Q Did you ever tell David Silverman you were offended by his conduct?

A I don't really recall, you know, if I told him, you know, I found it offensive.

Q Did you ask him to stop?

A No, I don't believe I did.

Q How about Mr. Terry, did you ever tell him you found his behavior offensive and wanted him to stop?

A I didn't, you know, speak the words, "I find this offensive."

Q Okay. And I think you mentioned before that your captains during most of your employment were Parks and Morrison?

A That's correct.

Q Did those two men engage in any sexual banter or teasing with you?

A Not that I recall.

Q Okay. And Morrison was a captain throughout that period, and, as Captain, was he David Silverman's supervisor?

A Yes, he was.

Q And did you ever complain to him that David Silverman was engaging in language that you found offensive?

A No, I did not.

Q And how about Pat McGowan, did you ever complain to him that you found David Silverman's language offensive?

A No, I don't believe I did.

Page 212, lines 24-25; Page 213, lines 1-8

Q And, if I recall correctly, you claim that Mr. Terry touched your thigh in April of 1990?

A Yes.

Q That incident upset you?

A Yes, it did.

Q And you already knew you were leaving your job at that point?

A Yes.

Q Did you complain to anybody in management?

A No, I did not.

Cross by Burke
Page 226, lines 2-6; Page 227, lines 4-14

Q You never told Mr. Terry after pulling away, "Please, don't touch me in that fashion," or, "I find that offensive," or "I would rather you not touch me," or any words to that effect; correct?

A I don't recall making any statements of that type.

Q You have a sister Kit Faragher?

A I have a sister Kit Faragher. It is her married name.

Q All right. During the time that you worked at the City of Boca Raton, your sister applied for employment there; isn't that correct?

A Yes, I believe she did.

Q All right. You never made any attempt to stop your sister from coming to work at the City of Boca Raton; is that correct?

A No, I didn't.

DAY 3
June 23, 1994

TESTIMONY OF BEVERLY ANN BARTA

Direct by Amlong
Page 3, lines 10-12; Page 4, lines 5-25; Page 5, lines 6-25; Page 7, lines 1-9

COURT State your full name, please, and spell your last.

A Beverly Ann Barta, B-a-r-t-a.

Q And was there a time previously that you were employed by the City of Boca Raton.

A Yes. I had been employed by the City of Boca Raton off and on for a period of about five years. I worked part-time Gumbo-Limbo Nature Center for the City of Boca Raton.

And then I worked for one year at Meadows Park swimming pool for the city as a weekend lifeguard, and then three years for the City of Boca as an ocean lifeguard.

Q And when did you work as an ocean lifeguard?

A What were the dates?

Q Yes.

A I think approximately from '89 to '92.

Q And during the time that you worked at the

City of Boca Raton as an ocean lifeguard, were you familiar with Bill Terry?

A Yes.

Q And were you familiar with David Silverman?

A Yes.

Q During the time that you worked as an ocean lifeguard, did there ever come a time when Mr. Terry touched you in a manner that you felt was not appropriate?

A During my employment as an ocean lifeguard, there were two instances where Bill Terry had touched me in an inappropriate way. In both instances were after a morning meeting where we were all inside the building, inside the headquarters building.

The headquarters building was full of lifeguards getting ready to go out for their shift, and during those two instances he had grabbed me in my buttocks area.

He was kind of in a corner where other people really couldn't see what was happening, but I felt what was happening. When I turned around, out of the corner of my eye, I saw who had grabbed me, and it was indeed Bill Terry.

Q Did you do anything that you intended as an invitation for Mr. Terry to so touch you?

A No. I was simply getting ready for my shift, to

go out to my lifeguard stand.

Q During the time that you were employed by the City of Boca Raton as an ocean lifeguard, did you ever hear Mr. Silverman say anything that you felt — saying anything sexual that you felt was not appropriate.

A Yes. I think David Silverman often used vulgar language, and I have heard him ask at least one female lifeguard for a blow job.

Q Which female lifeguard was that?

A Betty Lynn [sic].

Q Was Mr. Silverman your superior when you were at the City of Boca Raton as an ocean lifeguard?

A Yes, he was a lieutenant.

Q And during that time that he was a lieutenant, did you have occasion to give to Mr. Silverman a signed but undated resignation?

A Yes, I did.

Q Would you please explain to Judge Highsmith how you came to give Mr. Silverman your signed but undated resignation?

A Well, the details are a little bit fuzzy since this was several years ago.

I recall David Silverman said he had a problem

working with me and he took the matter to Bill Terry, and Bill Terry and Dave Silverman and I had a conversation outside of the headquarters building saying that they would try to overlook the fact that I was difficult to work with if I would sign this resignation and they could submit it at any time for any reason. If I signed this, I could then keep by job for the time being.

Q Did you consider Mr. Silverman to be your supervisor?

A Yes.

Q Your boss?

A Yeah. Because he was in more of an authoritative position than I was. I was just a lifeguard and he was a lieutenant.

Cross Examination by Stutin
Page 8, lines 19-25; Page 9, lines 1, 24-25; Page 10, lines 1-25; Page 11, line 25

Q You recall two incidents where Bill Terry allegedly touched your buttocks?

A Yes.

Q Did anyone else in the beach patrol engage in similar touchings? Did anyone else touch you?

A No.

Q Did you see Bill Terry touch anyone else ever?

A No.

Q You didn't complain to anybody in City management, though?

A Not at this time, no.

Q Okay. Do you recall whether the other male and/or female lifeguards sometimes engaged in off-color language?

A Can you define off-color language?

Q Bad words, curse words.

A Yes. I would say yes.

Q Was that typical?

A It depended on the individual.

Q It wasn't confined just to David Silverman, though?

A No. But he was — I would say as a leader, I would say he kind of set the tone or the mood for the climate there.

Q He was a lieutenant when you were there?

A Yes.

Q Did you receive a handbook when you were hired by the City?

A Yes.

Q And are you aware of avenues of complaint that you would follow if you had any problems?

A No. The beach unit was physically removed from the rest of the City, and we all felt pretty isolated from the rest of the workings from the City of Boca Raton.

Q Do you recall when we took your deposition in September 14, 1993, in this case, and do your recall the following questions and answers at page 17, line 7:

"Question: Were you aware of any other avenues of complaints you could have used if you didn't want to go to your lieutenant or captain?
Answer: Yes, I was aware of that."

Does that refresh your recollection that you were aware that there were avenues of complaint you could take if you wanted to avoid talking to your lieutenant or your captain?

A Being aware of an avenue and actually, logically, pursuing it are two different things. They could fire me at any time for any reason.

Q Okay. Do you consider your job being an ocean lifeguard as being a good job?

A It was basically a good part-time position, yes.

Q Would you characterize it as a great part-time

position?

A In many ways, it was — when you were out in your tour alone in the salt air and the ocean breezes, being paid to work out.

There were many positive aspects of the job. One of the least positive aspects, however, was being in headquarters and having to deal with the personalities of David Silverman and Bill Terry.

Q Did you go to a meeting to discuss what had been going on in the beach at Nancy Ewanchew's house?

A I don't know if you would characterize it as a meeting.

Cross Examination by Burke
Page 15, lines 7-25; Page 16, lines 1-17

Q Do you recall when you went — that the first time you had any discussions with the other female lifeguards concerning anything was when — concerning harassment was when you had this meeting or get-together at Miss Ewanchew's house?

A Yes. As I recall, it was the first time where we actually shared information about the experiences.

Q Prior to that, you and the other female lifeguards had not discussed amongst yourselves any complaints that you had about

Mr. Terry that related to matters of sexual harassment; isn't that right?

A I never discussed it with anyone else, no.

Q All right. With respect to the two touching incidents that you have described, you had no discussions with Mr. Terry at the time those incidents occurred; correct?

A Correct.

Q Made no complaints about the incidents to anyone else at the City of Boca Raton at the time the incidents allegedly occurred?

A Well, since there was no way of proving that he actually touched me, I felt there was no reason to go forward and say anything.

Q Would you be good enough to answer my question?

A Would you repeat it again?

Q Sure. At the time the incidents occurred you made no mention of them to anyone else at the City of Boca Raton?

A Right.

Q To your knowledge, no one witnessed this, including Miss Ewanchew or Miss Faragher?

A To my knowledge, nobody else saw it.

Q You went out and proceeded to work that day in the tour and continued on with your normal duties?

A Right.

Q All right. Would that be true with respect to both of these incidents, the questions I just asked you?

A Yes.

Cross by Goldstein
Page 17, lines 1-14

Q You mentioned that Mr. Silverman was often vulgar. It's true, is it not, that whatever vulgarities you overhead Mr. Silverman make were directed at groups of men in the locker room?

A No, I would say that they were equal between women and men.

Q Isn't it true that he directed these — this language mostly to men?

A Well, most of the lifeguards were men.

Q And they were in groups of mostly men; is that correct?

A I never noticed him really make a differentiation between the speaking patterns men versus women.

TESTIMONY OF DAVID SILVERMAN

Direct Examination by Amlong
Page 23, lines 15-16, 18-19; Page 24, lines 1-2
Page 26, line 25; Page 27, lines 1-24

Q Tell the jurors what your name is, what you do for a living, where you live.

A My name is David Silverman. I'm the marine safety captain of the Boca Raton Beach Patrol.

Q How long have you worked for the City of Boca Raton?

A I'm in my 14th year.

AMLONG Page 2, lines 1 through 3

Q Always as a lifeguard?

A Lifeguard and an aquatics lieutenant now, an aquatics — captain.

Q Did you ever request that Beverly Barta had signed a resignation form?

A Bill Terry had offered that as a solution to her problem, and she agreed. However, I did not ever offer that.

Q What was your problem?

A She would miss the morning meetings. They are mandatory, and there was a roll call training. And I had to discipline her a few

times because by missing a meeting, the person not there, it is destructive to others, and I was trying hard to get the beach running on time and trying to get the people back from lunch on time.

And I asked her to stop missing the morning meetings and to attend it like everyone else. And she always had an excuse as to why she would be late. And I said, "I just don't know what to do."

So I think either she or I or Bill or someone requested that the three of us meet to work this out. And I did not want to fire her or discipline her any more. That was not my intent.

And we were standing out east of the headquarters, and Bill had offered that as a solution, if she causes any more problem, then she would just leave and we would date it and that would be that. She felt that that was a good idea, and she did it.

Page 29, lines 1-25; Page 30, lines 1-25; Page 31, line 1

Q Did you learn anything from the discipline that was given to you by Mr. Lasalla?

A I don't think I learned anything from the discipline. However, from this entire experience, I believe I have.

Q Did the forfeiture of 40 hours of vacation pay

make you change the way you behaved?

A No, sir.

Q Do you consider that your actions toward any of the other female lifeguards to be inappropriate?

A Please repeat that.

Q Do you feel now your actions toward the female lifeguards about which Miss Ewanchew was complaining was inappropriate?

A No, sir, I don't know.

Q Do you feel that the language that you used in your conversations with female lifeguards was inappropriate?

A No, sir.

Q Who informed you about Boca Raton's policy concerning sexual harassment?

A I don't recall ever hearing the term or being informed about a policy until Nancy wrote the letter to Mr. Bender.

Q Prior to the letter to Mr. Bender, did anyone in the government of the City of Boca Raton ever, to your knowledge, affirmatively raise the issue of sexual harassment to you?

A I told you I never heard the term.

Q Did anybody ever tell you that if you made unwelcome sexual advances to a woman co-worker or subordinate, that you would be punished for it?

A Did anyone in the City ever tell me? Is that what you are asking

Q Yes.

A No, sir.

Q Did anyone ever tell you that if you used language that would make a reasonable woman feel uncomfortable on the job, such as the word cunt, that you would be punished for it?

A Did anyone ever tell me that?

Q Yes.

A No, sir.

Q When did you become a lieutenant?

A July of 1985.

Q When you became a lieutenant in the City of Boca Raton — I'm sorry. When you became a lieutenant, did anyone in the City of Boca Raton ever tell you how as a supervisor you should react to a situation in which one of your subordinates, one of your male subordinates, made inappropriate advances to one of your female subordinates?

A I don't recall anyone ever telling me that.

DEPOSITION TESTIMONY OF WILLIAM WIDD TERRY

Direct Examination by Amlong
Page 32, lines 12-19; Page 33, lines 11-16; Page 34, lines 12-25

Q What's your full name, where do you live, and what do you do for a living?

A My full name is William Widd Terry, the III. I live in Boca Raton, and I work for the City of Boca Raton.

Q How long have you worked there?

A Twenty-three years and a few days. Wait a minute. What's today? Twenty-three years tomorrow.

Q During the twenty-three years that you have worked with the City of Boca Raton, please tell me the first time that you recall that any of your bosses ever communicated to you either orally or in writing about sexual harassment?

A I can't recall anything up until the point where the letter from Nancy in. And the subsequent investigation.

Q Mr. Terry, I am showing you what's been marked as Plaintiffs' Exhibit 1 and what was identified as Plaintiffs' Exhibit 3 yesterday to Mr. Bender's deposition, during which time he

said this is the cover sheet he had used to send around a December 26, 1986, sexual harassment policy. It was supposed to be distributed to all employees.

Did you ever receive either the personnel memorandum 86, which is the cover sheet, or the attached sexual harassment policy statement that you recall?

A Did I ever receive it, is what you are asking me?

Q No. Did you prior to the City's getting the letter from Nancy Ewanchew, have you ever had this.

AMLONG And then he examines the document.

A I really don't know.

Page 35, lines 23-25; Pages 36-40, lines 1-25

Q Tell me what your job duties were as marine safety chief?

First of all, tell me when you first became marine safety chief?

A Mid-'70's. I don't know when exactly. The basic day-to-day operations of the beach, preparing budgets, making recommendations — well, requesting testing dates and making recommendations for hiring, keeping the line of communications opened between downtown and the beach, staff meetings,

participating in the evaluation process.

Q You said that you made recommendations that people be hired?

A Yes.

BURKE Page 13, line 23:

Q Who made the decision as to whether or not someone would be hired?

A That works through the chain of command with the City, and I would made my recommendations to the Parks and Recreation Office, and they in turn would send it on to personnel. And barring no problems on their part, that's the way it worked.

Q Can you recall any recommendation to hire someone that you made that was not acted favorably upon?

A In twenty-years, we hired a lot of people, and in life saving, there is quite a turnover, and I believe there was times where our staff would do the interviews, and perhaps I would be included in that if I was on duty or whatnot.

And we do some job reference checking, and we would send it through under my signature, of course, and either Parks or Recreation or Personnel would find a reason that we did not hire that individual.

Q Can you recall any specific?

A Oh, it seems to me that there were a number.

Q Can anybody be hired with out your recommendations?

A I don't know. I guess likely not. But if I had been off and there was some kind of a need to test and —

Q Was anybody, to your knowledge, ever hired as an ocean lifeguard against your recommendations?

AMLONG Mr. Burke interjects, "While he was marine safety chief?" And I say "Right."

A A simple answer would be no. We got to working on a team work-type of basis, and sometimes through the interviews, if two out of three of us involved, or three out of four of us involved were high on somebody and the other person wasn't, well, majority ruled.

Q But would that carry your recommendations?

A I might be the dissenting vote, but it would still carry my recommendations because that's what the team decided.

Q So, no one ever got hired without the hiring recommendation being signed by you if you were on duty when it was going on?

A That's a fair assumption.

Q How about firing? Who fired people?

A That's a matter that goes to Personnel and the City Manager. They make that determination.

Q Who initiates firing people?

A Staff at the beach or myself, or inclusive.

Q Is there a recommendation for firing that goes in to Personnel?

A Sometimes it was in the form of a letter. Sometimes it was the problem may have been brought to my attention and then discussions were held between myself or other staff at the beach with Recreation people. They made the decision.

Q Did you have the authority to initiate a termination?

A Yes.

Q Did you have the authority to recommend suspension?

A Yes.

BURKE Continuing on Page 21, lines 10 through 18

Q Did anyone below your level have the authority to formally recommend suspension?

A Basically, like I indicated before with terminations, if I was off, one of the supervisors had a problem with somebody, policy was violated, they would bring it to my

attention on my return to work, or even to my boss' attention if I was off and it was a day that the person was on, and the decision would be at that level.

Q Did you participate in the evaluation process?

A Yes, I did.

Q Did you have to approve the final evaluation of each person who was an ocean lifeguard?

A Yeah.

Q When you evaluate somebody and they scored however many points they scored in the evaluation, did that equate to a specific percentage of salary increase?

A That was pointed out yesterday, yes.

Q What discussions did you have with your subordinates concerning sexual harassment?

AMLONG Mr. Burke interjects, "Prior to Miss Ewanchew's letters?" and I say "Yes".

A I don't think we had any.

Q What discussions did you have with any of your superiors about sexual harassment prior to Mr. Ewanchew's letters.

A I don't think any.

Q Prior to Miss Ewanchew's letter, did anybody

at the City of Boca Raton affirmatively raise to you the sexual harassment?

A Can you change those words to something that is a little bit more —

Q Did anybody every come and say to the effect of we need to discuss what the City's sexual harassment policy is?

A No.

Q Did anybody prior to Miss Ewanchew's letter ever express to you the City of Boca Raton's strong disapproval of sexual harassment?

A No.

Q Did anybody indicate, prior to Miss Ewanchew's letter, that if you engage in sexual harassment, that you could be punished for it?

A No.

Q Did anybody in the City of Boca Raton, prior to Miss Ewanchew's letter ever tell you as a supervisor — did anybody in the City of Boca Raton, prior to Miss Ewanchew's letter, ever tell you how you, as a supervisor, should deal with complaints about sexual harassment?

A No.

Q Did anybody in the City of Boca Raton, prior to Miss Ewanchew's letter, ever do anything whatsoever to sensitize you to the issue of

sexual harassment?

A I think I already answered that. The answer is no.

Page 44, lines 21-25; Page 45, lines 1- 12

Q Who does the interviewing for lifeguard lieutenant?

A Lifeguard lieutenant?

Q When you were marine safety chief?

A In other words, your asking the interviews for lieutenant position?

Q Yes.

A Staff and house.

Q What's that mean, you or —

A Me, captains.

Q Who made the final recommendations?

A I would sign the ultimate letter with that recommendation, but it would come from a team-type discussion in a democratic way, the majority rules.

Q How about for captains, how are the captains chosen?

A Well, basically, the same way. I mean, I could

go through the whole thing again, but it's got to be through advertising, in-house or out.

DEPOSITION TESTIMONY OF RICHARD BENDER

Direct Examination-Amlong
Page 48, lines 13-25; Page 49, lines 1-13, 21-25
Page 50-53, lines 1-25; Page 54, lines 1- 6

AMLONG Your Honor, these are excerpts from the deposition of Richard Bender that was taken at my office in Ft. Lauderdale December 28, 1993.

Q What's your job at the City of Boca Raton?

A Director of personnel and labor relations.

Q How long have you been doing that job?

A Since February of 1986. Prior to that, from November of '77 to approximately May of '81.

Q And continuously from February 1986 forward?

A Yes.

Q As a personnel professional who since at least 1977 has had responsibility for Equal Employment Opportunity clients, are you familiar with the Equal Employment Opportunity Commission's guidelines and discrimination because of sex?

A I would not consider myself an expert, and I don't recall a specific provision.

Q Have you ever read the regulations issued by the Equal Employment Opportunity Commission?

A I'm sure that I have in the past, yes.

Q Prior to 1991, what steps, if any, to your knowledge, did the City of Boca Raton take to affirmatively raise the subject of sexual harassment with its employees?

A The first step that I'm aware of would have been in 1986 when, I believe it was in February of '86. It was — there was a memorandum policy issued by the city manager Rutterford to all employees.

Q How is that document distributed?

A You know, I don't know precisely. I could tell you what our routine is. Our routine is that we issue documents like this to department directors, expecting that they will post them on bulletin boards and they will also give copies to the timekeeper for distribution in paychecks.

Q Other than the issuance of the sexual harassment policy on February 26, 1986, what else, if anything, did the City of Boca Raton do between 1986 and 1991 to affirmatively raise with its employees the subject of sexual harassment?

A I don't recall exactly when it was. There did come a time when we requested of Mr. Hurtgen and one of his associates to come up and address the city department heads to issue training and deal with other civil rights issues.

Q Now, within the parks and recreation department, how well would they have gone down? I mean, would he have met with Mr. Terry that day?

A No, it would have been Mr. Alexander.

Q The parks and recreation director?

A Right.

Q What, if anything, did the department directors do following that meeting, to your knowledge?

A I don't know.

Q Was there any plan that they disseminated where they had learned their subordinates?

A I don't know what they — I don't know what plans they had.

Q Did you put this together as part of your job function?

A I requested Mr. Hurtgen to come and put on the presentation to the department heads, yes.

Q When you requested that, did you have a plan

that this was to somehow trickle down to the division directors?

A I didn't have plans for the department heads to conduct trainings themselves, no.

Q Okay. So, other than the issuance of the February 26, 1986, sexual harassment policy, and Mr. Hurtgen and his associates to come up and discuss it, what, if anything, did the City of Boca Raton do between 1986 and 1991 to affirmatively raise the issue of sexual harassment with its employees?

A Again, I don't recall the time, but there was an occasion when Mr. Hurtgen put on the sexual harassment training program from our police department.

Q Anything else?

A Not specifically that I can recall.

Q Why did you choose the police department to have a special sexual harassment training program.

A I didn't. The police chief requested it.

Q Other than the issuance of the February 26 policy statement prior to 1991 — I'm sorry, prior to the 1990, what, if anything, did the City of Boca Raton do to express its strong disapproval of sexual harassment?

A Its strong disapproval of sexual harassment

was again in a 1986 policy issuance by the city manager.

Q I am saying after that; in addition to that?

A Oh, in addition to that?

Q Yes.

A I don't know anything in the way of any official program. We are constantly, through my office, are in contact with supervisors and with employees, and we constantly try to urge employees who have problems to work through the chain of command and get their problems addressed.

We also constantly encourage supervisors to be open and available to employees who have problems, try to quell them.

As I said earlier, it is not in the interest of the City of Boca Raton to have problems fester out there. We want to be informed by employees, and we want supervisors and, if necessary, my staff to respond to them promptly.

Q That refers to in general.

I am asking you, did you do anything specifically as regards to sexual harassment to express strong disapproval of that by the City's management and its personnel and labor relations departments?

A Nothing other than what I have already

indicated.

Q What, if anything, did the City of Boca Raton do prior to 1991 to develop appropriate sanctions for sexual harassment?

A I don't think we would view sexual harassment as having appropriate sanctions. We would review sexual harassment as any other misbehavior. We would evaluate the specifics of the situation and respond to it as to what we thought appropriate.

Q Now, prior to Miss Ewanchew's complaint, what, if anything, did the City of Boca Raton do other than to issue the February 26, 1986, sexual harassment policy to inform employees of their right to raise and how to raise the issue of harassment under Title VII?

A On that specific issue, nothing, but employees of the City of Boca Raton have been, as you said earlier, repeatedly had available to them, the opportunity to talk to supervisors through an informal process. There were grievance procedures set forth under the personnel rules open to them. There were other grievance procedures opened to them under the various collective bargaining agreements providing they were a member of the collective bargain agreement.

Q But the City did nothing specifically to address the problem under Title VII.

A No.

Q Nothing specifically?

A No. We didn't do anything specifically for sexual harassment. We certainly would have intended those procedures be open to employees to pursue sexual harassment claims, or any other claims of ill treatment.

Q Prior to 1991, what, if anything, did the City of Boca Raton do to desensitize all concerned concerning sexual harassment?

A Essentially nothing, other than I recounted already.

Page 55, lines 1-23; Page 57, lines 16-25; Page 58, lines 1-10

Q During the time that Miss Ewanchew and Miss Faragher were employed as lifeguards by the City of Boca Raton, did you consider that their superiors on the beach, the other lieutenants or other lifeguards, had an affirmative duty to report to your office what they, any improper behavior they think <HOFRBGDZ> that could be construed as sexual harassment?

A Well, either report to me or report it to someone within the department's chain of command structure, yes.

Q And during your investigation of Miss Ewanchew's complaints, you satisfied yourself there had been inappropriate behavior occurring on the beach; correct?

A Yes.

Q Is a lifeguard captain considered to be a supervisory personnel?

A Yes.

Q Do supervisors have a responsibility to report to you sexual harassment that they observe in subordinates or in fellow supervisors?

A Well, again, if a supervisor observes some behavior of any type, be it sexual harassment or anything else that is inappropriate to the workplace, then, yes, I would say it's incumbent on that supervisor to report it to either me or someone else within the chain of command of the department or someone else in the City with the position of authority.

Q There is a captain named Flash Gordon; correct?

A Yes, there was.

Q And Mr. Gordon was aware of sexual harassment on the beach; correct?

A I don't know that he was.

Q Did Mr. Gordon ever inform you that he was aware of sexual harassment?

A No, he didn't.

Page 64, lines 22-25; Page 65, lines 1-9

Q Tell me what Bill Terry's job was as marine safety chief?

A What his job was?

Q Yes.

A He was to supervise the ocean lifeguard operation of City of Boca Raton.

Q Did Mr. Terry have the authority to hire and fire people?

A No.

Q What did he have the authority to do?

A Make recommendations.

Q For both hiring and firing?

A Yes.

COURT'S ORAL RULING ON DIRECTED VERDICT

Page 108, line 2 through Page 111, Line 2:

THE COURT: Well, let me note that counsel made some very interesting, and as I indicated before we left, intriguing arguments in support of their respective motions, and I can advise you that I have taken those quite seriously. I think we should. There's a tendency to approach questions at this stage in a trial, or motions at this stage in a trial, with something of a cavalier attitude. We have not done that.

I will tell you at the outset what my rulings are, but I want to also advise you of at least one matter that gives me considerable concern; and in an abundance of caution, I am postponing an ultimate decision on that particular issue until the conclusion of this case.

But, first of all, I will deny the City's motion with regard to retention, the retention issue. I have heretofore denied the other motions.

But with regard to the City of Boca Raton, let me advise you, respectfully, Mr. Amlong, I have considerable concern about the matter of notice, that elusive term called pervasive.

I have not yet, of course, heard all of the evidence nor assessed all the evidence, but it appears to me that there is an interesting parallel. And perhaps at this point, or in my ultimate decision, I may decide that it is an improper parallel, but at least an interesting parallel was raised by virtue of the testimony of the witness Barta.

And while I will assess the credibility of all of the witnesses at the appropriate time, I recall in reviewing some of the case law with my clerk that I observed her, and will make the finding at the appropriate time that the witness Barta was the most credible witness that I have assessed, not only in this case, but in my tenure on this particular bench. I was impressed with her candor, her responsiveness, her directness to the questions, her lack of evasiveness.

But out of that arose the question, well, if she was not aware of what one might compare to reputation, or a situation of such proportion that we must find it to be pervasive, then how could we expect the City to be aware?

And in that regard, at least for the purpose of this motion, I have made a determination that neither Terry nor Silverman, and I use their names, last names, respectfully, as parties rather than designate them by their full names, but neither of those individuals, neither of those defendants were in a position, it appears to the Court, sufficient or of such standing, the law of the case on the subject to be considered for all practical purposes high enough echelon to be the City itself from the standpoint of knowledge, much as we impute the knowledge of a president or board of directors or executive director of a corporation to the corporation itself.

But, then, on the other hand, and I address this to the City, I am reminded of the fact in reviewing my notes that Miss Barta was not a full-time employee. So, maybe, that's the reason she wouldn't know it.

On the other hand, the City is there all the time. And then we face the problem of equating the knowledge that we have about the uniqueness, if you will, of the lifeguard unit. While there has been little testimony on it, all that there has been has been consistent with only one conclusion, and that is not necessarily a stepchild, but certainly a part or segment of the City that's not quite as aligned with the overall activity of the City, or as I think was referred to by the witness I have already alluded to, far enough away from the City Hall not to really be so close that you would run in and talk to somebody about what was going on, that you were sort of segregated, using that term loosely.

A lot of things to think about. I want you to think about it because either I will allow you to argue it, or if I don't have time, I will allow you to make further written submission at least on that subject.

That having been said, the motions of the respective individual defendants are denied, denied in their entirety.

DEPOSITION TESTIMONY OF GAIL NYE

Page 116, lines 9-12

Q Okay. How about Bill Terry? Did he engage in any kind of similar behavior?

A I don't remember him using any specific vulgarity verbally.

Page 126, lines 20-25; Page 127, lines 1-25; Page 128, Line 25

Q Did anyone from the City of Boca Raton make any attempt to educate you about the City's policy concerning sexual harassment?

A No.

Q Did anyone from the City of Boca Raton make any effort to educate you about the laws governing retaliation for complaints about sexual harassment?

A No.

Q Were you afraid to complain to anybody at city hall about Mr. Silverman?

A Yeah.

Q Were you afraid to complain to anybody at city hall about Mr. Terry?

A Yes.

Q Why were you afraid?

A Because I thought I would lose my job because I am part-time. I was part-time.

Q Did you ever complain to Flash Gordon — what is Mr. Gordon's first name?

A Flash. Oh, well, Robert Flash, though.

Q Okay. And he was a training officer or —

A Yes.

Q — a captain? He was somehow superior to you?

A Yes.

Q And did you ever complain to him about what Mr. Silverman said concerning your "clit"?

A Not officially like at work. But probably off the job, yeah.

Q Did you bring it to his attention at some point?

A Yes.

Q Did you ever bring the cunt remark to Mr. Gordon's attention?

A Yeah, I did.

BURKE Page 87, line 22

Q Did you ever mention any of the incidents to Mr. Gordon concerning Mr. Terry's putting his arm around you.

A I don't remember if those, specifically, I did not, to tell you the truth.

Q Do you know who was responsible for your being terminated from the City of Boca Raton as a lifeguard?

HURTGEN Go to page 94, please, line 6.

Q Okay. Did you consider the context of these clubs to be exploitive of women at all?

A I used to think that —

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A I used to think that at first. As a matter of fact, when I went to get hired at Solid Gold, believe it or not, when I answered the ad in the paper, I didn't know it was a strip bar. I didn't know it was strip bar until we had our first few meetings. That was before the club ever opened.

So call me naive, but until a few nights before — when the dancers showed up, then I realized what was going on and I threatened to quit. As a matter of fact, I did quit. After a few nights, I thought that may not be the thing for me and I quit.

Page 129, lines 14-25

Q Okay. When Mr. Amlong was asking you a few questions about discussing certain instances with Flash — you said. Yes, you had told him about it — I can't recall which two things, but maybe you can refresh my memory.

A Well, the thing with Silverman in the tower, and the times when he would say stuff about Rob and myself. But I said it probably too much in passing. It wasn't really a complaint. It was more like a comment, I suppose.

Q Because earlier when we talked about it, you said you think you might have mentioned it in the context of a group situation, more of a social than a work situation?

A Yeah.

TESTIMONY OF SANDRA DIOLI KUMM

Direct by Stutin
Page 136, lines 10-22; Page 138, lines 22-25; Page 139, lines 1-14; Page 140, lines 6-16

Q Were you employed by the City of Boca Raton?

A Yes, I was.

Q And in what capacity were you employed?

A I was the recreations superintendent.

Q And who did you report to as recreations

superintendent?

A Tom Alexander, the director.

Q Do you recall what dates you were employed in that capacity?

A March of '88 to May of '89.

Q And as recreation superintendent, did you directly supervise Bill Terry?

A Yes, I did.

Q Okay. While you were down at the beach on those occasions, did you also have occasionally the opportunity to observe the guards interact with one another?

A Yes, I did.

Q Specifically, did you see their interactions in the locker room?

A Yes, I did.

Q And how would you describe them?

A Sophomoric, bantering, playing around, snapping of towels, talking about girlfriends, boyfriends, rather than keeping the work mode in mind.

Q All right. And did you see both male and female guards engage in that kind of —

A Yes, I did.

Q Did anyone seem offended by that environment?

A No. It seemed like the normal course of action.

Q Did they seem like they were having a good time?

A Yes.

Q Were you ever approached by any of the guards to complain that the environment was sexually offensive to them?

A No.

Q Did you hear any complaints specifically about Bill Terry touching the buttocks or breasts of any female lifeguard?

A No, I did not.

Q Anyone come to you to complain about David Silverman's language?

A No.

TESTIMONY OF LORRAINE GARDNER

Direct by Hurtgen
Page 154, lines 8-25; Page 158, lines 1-14

Q When did you become the superintendent of recreation?

A In 1974.

Q What was the job? What did it entail, what were your responsibilities?

A Well, my responsibilities were to oversee all of the City's recreational facilities.

Q And what were those?

A Well, we had the beach, tennis courts, shuffleboard courts, swimming pool, and the community centers.

Q Okay. Let me direct your attention to the beach activities.

What did we call or what is that entity known as?

A Well, back in '74, it was only South Beach and Spanish River Park. Since then, Red Reef Park had been added to it. So there were really three separate beaches.

Q And how many employees were employed at those three beaches, total?

A Depending upon the time of the year, there could have been anywhere between 30 or 40.

Q Thirty to 40?

A Full or part-time.

Q Would that be both full and part-time?

A Yes.

Q And what were the positions of employees at that time?

A Well, there was the regular ocean lifeguard, and then there was the lieutenant, the captain and the chief.

Q Okay. Who as the marine safety chief?

A Bill Terry was the chief.

Q All right. And you held this recreation superintendent job from 1974 until January of 1988, is that right?

A Mm-hmm.

Q Was Mr. Terry the chief throughout all that time?

A Yes, he was.

Q To whom did he report directly?

A He reported directly to me.

Q Okay. How much contact did you have with him?

A I saw or talked to Bill daily.

Q All right. Where — if you saw him, where would you see him?

A Most of the time, it was in my office. Occasionally, I would see him at beach headquarters.

Q Okay. How often did you go to beach headquarters?

A Again, depending upon the time of year and what other job responsibilities I had, I would say on an average of maybe every other month.

Q Okay. Did you go to the beach areas other than beach headquarters?

A Oh, yeah. I traveled the A-1-A, the strip on A-1-A, just to observe the lifeguards and make sure all the towers were covered, and just to see what was going on in the beach, not necessarily getting out of the car.

Q Did you at times get out?

A Oh, yes. I got out.

Q How often did you make these trips to the beach itself?

A Oh, I would say two or three times a week.

Q Okay. The employees that you have described, the lifeguards, the lifeguard lieutenants, were they covered by a union contract?

A They were — let's see. The lifeguards were covered. I believe the lieutenants were covered. I don't think the captain and the chief were covered.

Q When you were at beach headquarters at any time, do you recall hearing Mr. Terry use off-color or language that was derogatory toward women in any way?

A No, I didn't.

Q Did anybody ever tell you that there was raw and/or sexually offending language about or directed to women at the beach?

A No.

Q Did you have any role in the disciplinary scheme for the lifeguards and the lieutenants at the beach?

A Only if they were given three reprimands by their supervisors. Then they would be brought to my office for a counseling session.

Q And did that happen quite a bit?

A No. I wouldn't say any more so than any other portion of my responsibilities.

Q Okay. But if I understand, I don't remember

testimony, if the lifeguard got three disciplinary notices, the next step was to come and talk to you?

A That's basically it.

Q When you were at the beach headquarters or when you were patrolling or visiting the beaches themselves, did you ever see any lifeguard or lieutenant or Mr. Terry engaging in a touching of any other lifeguard that might be offensive?

A No, sir, I did not.

Q Did anybody ever tell you that some of that went on?

A No.

Q Did you ever have complaints about Mr. Terry of any kind?

A No. Well, just the same types of complaints that would come from any employee about their supervisor.

Q Could you give me some examples?

A I think probably the biggest complaint that I got was that he tended to show favoritism.

Q All right. Did he tend to show that in respect specifically to men or women?

A No.

Q How did you learn or how was it ever presented to you that he tended to show favoritism?

A Usually in the counseling sessions when the guards were brought to my office.

Q Okay. And they would complain about Bill Terry?

A Yeah.

Q All right.

Cross Examination by Amlong
Page 159, line 25; Page 160, lines 1-24

Q When you were supervisor — when you were the recreation supervisor what, if anything, did you do to make sure that the people under you were not engaging in any sex discrimination or sexual harassment?

A In 1962? No.

Q No, when you became recreation superintendent in 1974, right?

A '74; correct.

Q And you kept that job for the next 14 years.

A Mm-hmm.

Q During those 14 years, tell Judge Highsmith what you did to make sure that people who

worked for you did not engage in any sexual discrimination or sexual harassment?

A I didn't feel I had to do anything, actually. I believe there was a memorandum or something sent down by the city manager that outlined, if I recall correctly, outlined specifics as far as sexual harassment, as far as the City was concerned. And that letter was given to every employee with their paycheck.

But I personally didn't feel I had to do anything unless it was brought to my attention, and you have to remember that most of my staff were men.

Q All of your direct reports, all of the people that reported directly to you were men?

A All except one.

TESTIMONY OF RICHARD MORRISON

Direct by Hurtgen
Page 162, Lines 11 through 17:

Q Could you tell us where you are currently employed, please?

A City of Boca Raton, marine safety.

Q What is your position there?

A I'm a marine safety captain.

Q How long have you held that position?

A Ten years.

Page 164, lines 2-24; Page 167, lines 24-25; Page 168, lines 1-9

Q You were at the beach for a long time, but from around 1985 to 1990, can you just describe generally what the beach environment was like, the inner action amongst the guards?

A I would say it was a typical locker room for a beach patrol. There was inner action between all the lifeguards. I would say it is on a friendly basis, if that's what you were getting at.

Q People were friendly?

A Yes.

Q There was some joking going on?

A Yes.

Q Were the joking or kidding of a sexual nature?

A Probably, yes, I would say it was.

Q Okay. Was there any off-color language that you would hear?

A Yes.

Q And did this conduct, this environment, was it participated in by both the male and female

lifeguards?

A Yes, I would say so.

Q In particular, do you recall whether Nancy Ewanchew was one of the participants in that friendly, kidding joking exchange?

A Yes, I would say she was.

Q Are you aware that Nancy Ewanchew resigned as an ocean lifeguard about April of 1989?

A Yes, I am.

Q Did you have occasion to observe her come back at that point and ask for her job back at beach patrol?

A Shortly after she resigned at Boca Beach patrol, she was working for the County and wanted to know if we needed part-time lifeguards. She was looking for part-time work.

Q So she wanted her job back part-time for the City of Boca Raton?

A That's right.

Page 170, lines 11-24

Q And in the twenty years that you have been working with Mr. Terry, have you ever observed him touching a female guard in the breasts or buttocks?

A No, haven't.

Q On the thighs?

A No.

Q Have you ever heard Mr. Terry use vulgar language around the female lifeguards, or directed at them?

A No, I haven't.

Q How about Mr. Silverman, have you heard foul —

A No, sir, nothing.

Q Did you ever hear Mr. Silverman invite a female lifeguard to have sex in the back of his truck?

A No, I haven't.

TESTIMONY OF RICHARD BENDER

Direct by Hurtgen
Page 186, lines 18-25

Q What is your position with the City?

A I am the director of personnel and labor relations.

Q How long have you held that job?

A I have held the position on two separate

occasions, once from November 1977 to, I believe, May of 1981. I had then left the City. I returned to the City in February of 1986, and I have been there up to the present time.

Page 190, lines 20-25; Page 191, lines 1-15; Page 192, lines 1-25; Page 193, lines 1-2, 8-25; Page 194, lines 1-6, 11-23; Page 195, lines 15-23; Page 196, lines 2-3, 9-25; Page 197, lines 1-9, 15-25; Page 198, lines 1-25

Q All right. Was there a collective bargaining agreement in effect at all times relevant concerning the lifeguards and the lieutenants in the marine safety section?

A Yes. The ocean lifeguards and the lifeguard lieutenants are members of the union represented by the International Brotherhood and Oilers, Local 1227, and had been sufficiently, I would say, since 1974.

Q Since 1974, who have been the principal business agents for that bargaining unit?

A The president of Local 1227 is a woman by the name of Dawn Donard, D-o-n-a-r-d, and she is assisted by another woman by the name of Wanda Stimson. Miss Stimson is a business agent.

Q All right. Does your position as personnel director include meeting with union representatives concerning grievances?

A Yes, it does.

Q Have you ever met with Miss Bonard or Wanda Stimson concerning any grievances arising out of the marine safety section?

A Yes, I have.

Q Have grievances filed by the union on behalf of lifeguards ever gone so far as all the way to arbitration?

A Yes, they have.

Q On more than one occasion?

A Yes, they have.

Q Have you ever had a complaint brought to your attention — strike that.

I'll ask it. Have you ever had a complaint brought to your attention from a union representative concerning demeaning or derogatory language or treatment of lifeguards by anybody in supervision?

A No, I have not.

Q All right. Prior to Miss Ewanchew's letter to you in April of 1990, had there ever been any complaint brought to your attention of any conduct, verbal or otherwise, by anybody in the beach patrol or the marine safety section that might be considered offensive on a sexual basis?

A The only occasion that I can recall in that

parameter would be an incident, I believe it occurred in the spring of 1986, shortly after I returned.

It involved a lifeguard lieutenant by the name of John Calhoun, who I had learned at a morning meeting had lowered his bathing trunks and mooned his fellow lifeguards.

Q How did you learn of it?

A I am not a hundred percent sure.

Q You may continue your answer, sir.

A I believe I was first made aware of it by Mr. Alexander, the department director. And I asked him in turn who had made him aware of it, and he indicated it was Captain McGowan.

I further inquired as to whether or not there were any female lifeguards present at the meeting, and he indicated that there was a woman by the name of Carol LaRue, as I recall. I asked Mr. Alexander if he would arrange a meeting in his office to be attended by myself and Captain McGowan and Miss LaRue, and he did so.

And we met, and that gave me an opportunity to inquire of both Captain McGowan and Miss LaRue as to exactly what had taken place. And I subsequently had a conversation as well with Miss Lorraine Gardner who had already learned of the incident.

And I recall I had a conversation with Lieutenant Calhoun about the matter and indicated her displeasure about the incident to him.

Q I am going to show you what's been marked for identification as Defendants' Exhibit CC. Mr. Bender. Can you tell us what it is?

A Yes. This was a write-up prepared by Captain McGowan at my request detailing his observations of that morning.

Q As a result of the incident reflected in your testimony and the Exhibit CC, was there any discipline issued to Lieutenant Calhoun?

A Yes, sir. Lieutenant Calhoun was issued a letter of reprimand by the City Manager.

Q I am showing you what's marked for identification as Defendants' Exhibit BB. Can you tell us what it is?

A This is the letter of reprimand that I just referred to.

Q All right. It was considered conduct unbecoming an employee of the City to do what Lieutenant Calhoun did, wasn't it?

A Yes, sir, it clearly was.

Q I am showing you what's been marked for identification as Defendants' Exhibit EE. Can you identify that for us, please?

A Yes. This is again a notation that I had requested from lifeguard Carol LaRue to me to detail her observations of the morning in which Lieutenant Calhoun mooned his fellow lifeguards.

Q Well, it was ocean lifeguard Carol LaRue who had complained about this activity on Calhoun's part, isn't it?

A Not only Miss LaRue complained, but also Captain McGowan.

Q Did any retaliation ever become visited, to your knowledge, on Miss LaRue for complaining about Lieutenant Calhoun's mooning?

A No, sir.

Q In all the time you have been personnel director for the City, in both the original period and as in the current one, has there ever, to your knowledge, been a complaint by any employee in any department that they had been retaliated against for grieving, complaining or bringing some action forward concerning their supervisor?

A No, absolutely not. We work very hard to try to encourage an open door for all of our employees. Our employee handbook states that very clear.

We encourage our supervisors to articulate that principle very clearly, and we always have.

I have never encountered any reticence on the part of any of staff to speak with either myself or my staff about any problem, either through their unions or through their own initiatives.

Q I am showing you what's marked for identification as Defendants' Exhibit DD. Can you identify that for us, please?

A Yes, I can. This is a write-up furnished to me by Lorraine Gardner. It details a conversation she had with Lieutenant Calhoun concerning the incident for which he was subsequently disciplined.

Q Now, sir, when did you commence your second, again, period of employment with the City?

A I believe the date was February 3, 1986.

Q All right. Did you take any action shortly thereafter in respect of a sex harassment policy for the City of Boca Raton?

A I did. It was an outgrowth of a refamiliarization of myself with the City's policies and procedures. I was going through the policy and procedure manual the City had in place at the time, so both get myself up to date of what was in effect, and also to see what needed to be amended or improved upon or added to.

And in going through the process, I noted that the City had made no specific statement with

regard to the issue of sexual harassment, and I thought it best that we do so. And, accordingly, my staff and I prepared a memorandum on that subject and asked the City Manager to sign it, and it was subsequently distributed to the departments for posting and issued with paychecks to City employees.

Q Is that what has been received in evidence, Mr. Bender, as Plaintiffs' Exhibit 5-A?

A Yes, it is.

Q Did there come a time when you updated the policy set forth in Exhibit 5-A?

A Yes, we did. Periodically, we do review the manual, for obvious reasons. It is important to keep the thing up to date and timely, otherwise it loses its usefulness.

I believe it was around the spring or late winter of 1990 that we commenced that exercise, and one of the policies we chose to update and expand was the policy we had written in 1986 on sexual harassment.

Q Is the updated policy you have just described that which has been received in evidence as Plaintiff' Exhibit 5-B?

A Yes, it is.

Q Now, it bears the date of what, sir?

A It bears a revision date of May 7, 1990.

Q And when did you receive Miss Ewanchew's letter complaining to you of certain conduct amongst the beach patrol supervisors?

A I am not a hundred percent sure. It was either May 2nd or April 30th.

Q All right. Is that policy update which you have as Plaintiffs' Exhibit 5-B a result of Miss Ewanchew's letter?

A Oh, no, it isn't.

Q Well, when was that which is dated May 7th there, when was it actually prepared?

A Well, we probably started making our initial drafts a couple months in advance of that. In fact, I particularly recall reviewing a couple of those drafts with our attorney who happens to be you yourself, Peter Hurtgen, prior to its ultimate finalization and issuance.

Q How long prior to its issuance of May 7, 1990, did it commence its drafting life?

A As I say, probably a couple of months.

Q Now, there did come a time, as you have just stated, that you received a letter from Miss Ewanchew in April of 1990, is that right? That is dated April 1990?

A That's right.

Q I asked you and you just answered, I think, that you received it, I think, May 2, 1990?

A It was either April 30th or May 2nd. I'm not a hundred percent clear on that.

Q All right. I am going to show you what has already been admitted, Mr. Bender, in evidence in this case as Defendants' Exhibit L.

Is that the letter you sent to Miss Ewanchew acknowledging her letter?

A Yes, it is.

Q And you invited her to meet with you; is that right?

A That's correct, I did.

Q When was it after you sent that letter — well, strike that.

What occurred after you sent that letter next, as best you recall.

A We sent the letter to Miss Ewanchew certified. Several days elapsed, as I recall, before I got a call from her, and she indicated at the time that she had been busy and not been able to get over to the post office to retrieve the letter.

So we discussed a convenient date which we could get together on, and as I recall, it was May 17th. That worked out. She asked me during the conversation if I was going to have

anyone else present at the meeting. I indicated that I would probably have Mr. Buddy Parks, who was then recreation superintendent.

Page 7, lines 17- 25

Q Now, at the time you spoke with Miss Faragher, she was not a complainant with regard to a charge with the EEOC, was she?

A No.

Q And she didn't come forward to talk with you, you asked that she come speak with you; is that correct?

A Yes.

Q And you then spoke with her?

A Yes.

DAY 4
June 24, 1994

TESTIMONY OF RICHARD BENDER

Cross by Amlong
Page 30, lines 1-2, 13-14, 22-25; Page 31, lines 1-16, 24; Page 32, lines 1-7, 10-14

Q Other than — what, if anything, did you do to prevent sexual harassment in the City of Boca Raton?

A There was no official action other than maintaining our normal vigilance over the work force.

Q Other than the mooning incident, have you ever heard, prior to Miss Ewanchew's complaint, of any complaint of sexual harassment within the City of Boca Raton?

A Prior to Miss Ewanchew's complaint?

Q Yes.

A I don't recall. It is somewhat problematic because the term "sexual harassment" wasn't as commonly used back in that period as it is today.

Q Mr. Bender, let me break it down to everyday words and not the buzz words.

Did you ever hear a complaint from any woman employee of the City of Boca Raton that her boss talked dirty to her?

COURT I will require that be put within certain time parameters.

Q From 1986 until you got Miss Ewanchew's complaint?

A Not that I recall.

Q Did you ever hear a complaint from any woman employee of the City of Boca Raton that her boss groped her?

A I don't believe so.

Q And you had several revisions of the personnel handbook during your tenure as personal and labor relations director; is that correct?

A Yes.

Q And not until after Miss Oakland's complaint, did you ever put sexual harassment into the personnel handbook, did you?

A No. We did not address sexual harassment in the handbook, per se. Again, I think — I believed our generalized statement to invite employees to bring forward any problems they had in the workplace to use was sufficient. We relied on that.

DEPOSITION TESTIMONY OF KELLY EVANS

Page 36, lines 7-13; Page 40, lines 22-25; Page 41, lines 1-12

Q Let me just start with your employment history. When were you hired — well, did you work as a lifeguard for the City of Boca Raton?

A Yes, I did.

Q And when were you hired?

A I believe it was the summer of — it would have to be 1984, I think.

Page 42, lines 16-25; Page 43, lines 1-22

Q Do you recall Bill Terry ever making comments to you or about you or any inappropriate comments?

A I don't remember him ever saying anything to me or anyone else while I was there.

Q Okay. How about any inappropriate touching, did you ever see any of the male lifeguards touch a female lifeguard in a way you thought was inappropriate?

A No.

Q Were you yourself ever touched by anyone that you thought was offensive?

A No.

Q Did you ever complain to anybody that either Bill Terry or David Silverman was sexually harassing you?

A No.

Q Did you ever feel that you were being sexually harassed while you were working on the beach?

A No.

Q Do you recall any instances where — well, let me just start. Can you just describe the locker room atmosphere for me?

A The locker room. Okay.

Q You share a locker room. All the lifeguards share one locker room?

A Yes, ma'am.

Q And was there a lot of joking or horseplay that went on?

A It was usually pretty light. Everybody was usually pretty friendly and pretty — there was some joking and some — I don't remember any things getting really out of hand.

Q You described it as friendly. Did you ever find the joking that went on to be offensive?

A Not that I remember.

Page 43, lines 23-25; Page 44, lines 1-8

Q And there was one shower in the locker room?

A Yes, there was.

Q Do you ever recall being afraid to use that shower for fear a male lifeguard would try and come in?

A No.

Q Do you ever remember guarding the door so that male lifeguards would not come in?

A That I guarded the door or —

Q Yes, or that you were in there and asked someone to guard the door for you?

A No, I don't remember that.

Q Okay. How would you describe your relationship with Beth Ann Faragher during your employment on the beach?

A She was a friend, a good friend.

Q Do you still keep in contact with her?

A Yeah. I get letters from her, and every once in a while I will see her. For a while, there she was still working down in Boca for summers while I was — would go down and visit my sister. But I get a letter from her and write her on occasion.

Q Has she ever discussed this lawsuit with you?

A No, she has not.

Q Did she ever discuss sexual harassment in her employment with you?

A No.

Q Not while you were employed and not after?

A No.

Page 45, lines 14-21

Q Okay. When you were hired, did you get an

employee handbook from the City?

A Yes, I did.

Q Were you aware if you had a grievance or a complaint how to pursue that?

A Yes. It was in the handbook. I'm not sure if I can remember the specifics now, but I remember that it was stated in the handbook.

DEPOSITION TESTIMONY OF PAT MCGOWAN

Page 54, lines 7-25

Q Were you at one time employed by the City of Boca?

A Yes, I was.

Q What was your position with the City?

A I was a marine safety captain.

Q Okay. Can you give me the approximate dates of your employment as a marine safety captain?

A 1972, I think January of 1973, till fifteen years after that, full fifteen years.

Page 70, Lines 16-23

Q What was your relationship with Beth Faragher when you were there and she was there?

A Pretty much the same. She was also an above average employee. She was always to work on time, never had any problems, easy to get along with.

Q Did Beth Faragher ever complain to you about anything or anybody in connection with her job?

A No, sir.

Page 75, lines 19-25; Page 76, line 1; Page 93, lines 6- 12

Q Okay. Did anybody ever say to you that they thought Bill Terry had used sexually harassing words or conduct directed at or about anybody?

A No, sir.

Q Did anybody ever say to you that they thought David Silverman used sexually harassing words to or about somebody?

A No, sir.

Q With respect to complaints, did Nancy Ewanchew ever complain to you that she felt that Bill Terry was harassing her in a sexual way either through language or actions?

A No, sir.

Q Same question with respect to Beth Faragher: Did she ever voice such a complaint to you,

sir?

A No, sir.

TESTIMONY OF WILLIAM TERRY

Direct by Burke
Page 129, Lines 1-17

Q During the time period 1986 to 1990, let's discuss for Judge Highsmith, although he might have a very clear understanding of the chain of command, you were in the parks and recreation department; correct?

A Yes.

Q Who did you report to?

A Over the years it was —

Q The position?

A The position was recreation superintendent.

Q And above recreation superintendent was what, please?

A There was a parks and recreation director and a deputy director.

Q All right. And below you as marine safety chief were a couple or three captains; is that correct?

A Yes, sir.

Q And then the lieutenants and the guards?

A True.

Page 132, lines 4-25; Page 133, lines 1-14

Q With respect to your authority as marine safety chief or beach supervisor, I know you have been sitting here and that's ranged in the testimony from nothing to actually being the Wizard of Oz.

Could you tell us what power you had, what authority you had as marine safety chief in the area of hiring, firing, disciplining of employees?

A Whatever decisions were made on what you mentioned, such as hiring or firing or severe discipline problems, the marine safety unit, the beach section, myself and my staff, would make recommendations to what we call downtown; basically, that meant to the parks and recreation department director, and he, in turn, would add a memorandum to that or make a note on that and then send it off to personnel, and whatever they did with it, back came affirmative or negative or whatever or a meeting resulted in it to find out more information, or whatever.

Q If you wanted to hire an employee and the position was available, could you unilaterally do it without obtaining the approval from someone else, sir?

A Absolutely not.

Q If you wanted to fire an employee for cause or for no reason, assuming they weren't a classified employee, could you unilaterally do that?

A Absolutely not.

Q If you wanted to suspend an employee without pay and you had cause to do so, could you do that unilaterally without obtaining someone else's approval?

A No, sir. No.

Q You mentioned your staff would get together and make recommendations. Who's your staff?

A It varied over the years between one captain and myself to two captains and a training officer and myself. I tried to get lieutenants' inputs. Sometimes some of the problems came from the lieutenant's perspective, and we had to deal with them above that.

City of Boca Raton

[Logo]

CITY HALL • 201 WEST PALMETTO PARK ROAD • BOCA RATON, FLORIDA 33432 • PHONE: (305) 393-7700

February 26, 1986

TO: All Employees

FROM: James A. Rutherford
City Manager

SUBJECT: Sexual Harassment Policy Statement

Title VII of the Civil Rights Act declares that sexual harassment is an unlawful employment practice.

Under the guidelines effective November 10, 1980, the Equal Employment Opportunity Commission contends that sexual harassment, whether verbal or physical in nature, generates a psychologically harmful atmosphere that inhibits performance on the job. Employers have an affirmative duty under Title VII to ensure that the work situation is free of discrimination in any form, based on race, sex, color, religion or national origin. Under the guidelines, an employer is responsible for the actions of its supervisory employees or agents and in some cases for the acts of others when the employer or a supervisory employee knows of or should have known of the behavior.

The guidelines establish three basic criteria for determining whether an action constitutes unlawful behavior;

- If submission to the conduct is either an explicit or implicit term or condition of employment;
- If submission to or rejection of the conduct is used as a basis for an employment decision affecting the person rejecting or submitting to the conduct; or
- If the conduct has the purpose or effect of substantially interfering with an affected person's work performance, or creating an intimidating, hostile or offensive work environment.

Specifically, sexual harassment is deliberate or repeated unsolicited verbal comments, gestures, or physical contact of a sexual nature which are unwelcome.

The city of Boca Raton, in spirit and in law, is dedicated to a strong policy against discrimination based upon sex. Sexual harassment is unacceptable conduct and will not be condoned. It is imperative that all employees be assured a work atmosphere free from sexual harassment. Violations of this policy will be cause for disciplinary action up to and including dismissal.

PERSONNEL POLICY &
PROCEDURE MEMORANDUM

Subject: SEXUAL HARASSMENT MEMO NUMBER: V-2

Effective Date: FEBRUARY 26, 1986
Revision Date: MAY 7, 1990.

SEXUAL HARASSMENT

I. PURPOSE: To assure the City's compliance with Title VII of the Civil Rights Act, which requires a stated policy against sexual harassment in the workplace and penalties for violations.

II. POLICY: Under the guidelines effective November 10, 1980, the Equal Employment Opportunity Commission contends that sexual harassment, whether verbal or physical in nature, generates a psychologically harmful atmosphere that inhibits performance on the job. Employers have an affirmative duty under Title VII to ensure that the work situation is free of discrimination in any form, based on race, sex, color, religion or national origin. Under the guidelines, an employer is responsible for the actions of its supervisory employees or agents and in some cases for the acts of others when the employer or a supervisory employee knows of or should have known of the behavior.

The guidelines establish three basic criteria for determining whether an action constitutes unlawful behavior:

–If submission to the conduct is either an explicit or implicit term or condition of employment;

–If submission to or rejection of the conduct is used as a basis for an employment decision affecting the person rejecting or submitting to the conduct; or

–If the conduct has the purpose or effect of substantially interfering with an affected person's work performance, or creating an intimidating, hostile or offensive work environment.

Specifically, sexual harassment is deliberate or repeated unsolicited verbal comments, gestures, or physical contact of a sexual nature which are unwelcome.

The City of Boca Raton, in spirit and in law, is dedicated to a strong policy against discrimination based upon sex. Sexual harassment is unacceptable conduct and will not be condoned. It is imperative that all employees be assured a work atmosphere free from sexual harassment. Violations of this policy will be cause for disciplinary action up to and including dismissal.

III. PROCEDURE:

1. Any employee who believes he or she has been the subject of sexual harassment should report the alleged act immediately to his or her department supervisor, department or division head or the Personnel & Labor Relations Director.

2. If a complaint involved a supervisor or manager, the complaint will be filed directly with the Personnel & Labor Relations Director or representative.

3. All complaints will be handled in a timely and confidential manner. Anyone involved in a complaint will be strongly discouraged from discussing the subject outside the investigation. The purpose of this provision is to protect the confidentiality of the employee who files a complaint, to encourage the reporting of any incidents of sexual harassment, and to protect the reputation of any employee wrongfully charged with sexual harassment.

4. Investigation of a complaint will normally include conferring with the parties involved and any named or apparent witnesses. Employees shall be guaranteed an impartial and fair hearing. All employees shall be protected from coercion, intimidation, retaliation, interference or discrimination for filing a complaint or assisting in an investigation.

5. If the investigation reveals that the complaint is valid, prompt attention and disciplinary action designed to stop the harassment immediately and to prevent its recurrence will be taken.

The City recognizes that the question of whether a particular action or incident is a purely personal

social relationship without a discriminatory employment effect requires a factual determination based on all facts in the matter. Given the nature of this type of discrimination, the City recognizes also that false accusations of sexual harassment can have serious effects on innocent individuals. We trust that all employees of the City will continue to act responsibly to establish and maintain a pleasant working environment, free of discrimination, for all. The City encourages any employee to raise questions he or she may have regarding discrimination or affirmative action with the City's Personnel Department.

EMPLOYEE HANDBOOK CITY OF BOCA RATON

This handbook was prepared by the Personnel Department, City of Boca Raton, and is based on the Personnel Rules and Regulations, Ordinance No. 2590, adopted January 23, 1979.

First Printing	February	1979
Second Printing	February	1981
Third Printing	June	1984
Revised	May	1986

* * *

Job Opportunity

The City of Boca Raton is an equal opportunity employer and prohibits discrimination because of race, color, creed, religion, national origin, sex, age, political affiliation or handicap in all aspects of its personnel policies, programs, practices and operations.

* * *

Your Supervisor

A very important individual to the new employee is the immediate supervisor. A supervisor is the leader of the work unit. This is a person who was chosen for a combination of experience, knowledge and ability. Your

supervisor will assign your work and explain the work rules and procedures applicable to your job. Your supervisor wants to help you become a good City employee and may have been the person who interviewed and recommended hiring you. So don't be offended if your work is criticized in a constructive way. Ask questions when you don't understand something; offer suggestions when you have a good idea. Remember, you are responsible to your supervisor for the performance of your work, just as your supervisor is responsible for the work of the entire unit.

* * *

Complaints or Grievances*

Occasionally, a problem or misunderstanding about work may arise. An employee may be bothered by a situation or may not understand a policy or procedure. In such case, don't keep it to yourself. See your supervisor and discuss the problem to see if there is something that can be done. You may also wish to speak to your division head or department head, or the Personnel Director.

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* Provisions of the section may differ from provisions of labor agreements.

The Personnel Rules and Regulations provide a formal grievance procedure which a permanent employee may use to pursue a grievance through the levels of management. A grievance is defined as a dispute involving the interpretation or application of a specific provision of the Personnel Rules and Regulations. Grievances

concerning an employee's suspension, demotion, dismissal, position reallocation or performance evaluation (unless based on factors other than performance) are excluded from the grievance procedure. However, suspensions, demotions and dismissals are appealable to the Civil Service Board. See the Personnel Rules and Regulations for more details.

* * *

ARTICLE 15
GRIEVANCE PROCEDURE

Section 1. Policy. It shall be the policy of the City of Boca Raton to provide a procedure for the presentation and mutual adjustment of points of disagreement which may arise between employees and their supervisors, and to assure employees that their problems and complaints will be considered fairly, honestly, and without reprisal.

Section 2. Purpose. The primary purpose of the grievance procedure is to determine WHAT is right rather than WHO is right. Free discussion between employees and supervisors will lead to a better understanding of the practices, policies and procedures which affect employment. It will also serve to identify and help eliminate conditions which have or may have caused misunderstandings and grievances. The purpose is defeated if a spirit of conflict enters into the consideration of a grievance. Supervisors and employees alike must realize and recognize the true purpose of a grievance procedure if such procedure is to have value in promoting the well-being of the City service.

Section 3. Definition of a Grievance. A grievance is defined as a dispute involving the interpretation or application of a specific provision of the Personnel Rules and Regulations, EXCLUDING disputes arising from an employee's suspension, demotion, dismissal, or performance evaluation, unless it is alleged that a performance evaluation is based on factors other than performance, or position reallocations.

Section 4. Procedure for Presentation of a Grievance.

(a) An employee with permanent status in the classified service shall take any grievance to his or her immediate supervisor within five (5) calendar days of the event giving rise to the grievance. The immediate supervisor who shall meet with the employee, review the grievance, make a decision, and advise the employee of the decision within five (5) calendar days of their meeting. It is neither necessary nor desirable that the grievance be presented in writing at this point. Supervisors are encouraged to consult with their department heads or any individual who may be able to offer assistance or information relative to the grievance.

(b) If the grievance is not resolved to the employee's satisfaction, by the supervisor, or if a decision is not made within the time specified, the employee may submit the grievance to the department head, in writing, within seven (7) calendar days of the immediate supervisor's response or, if a decision was not made within the time specified, within seven (7) calendar days of the date the response was due. The department head shall meet

with the employee, review the grievance, make a decision, and advise the employee of the decision in writing within ten (10) calendar days of receipt of the grievance.

(c) If the grievance is not resolved to the employee's satisfaction by the department head, or if the decision is not made within the time specified, the employee may submit the written grievance to the City Manager within seven (7) calendar days of the department head's response or, if a decision was not made within the time specified, within seven (7) calendar days of the date the response was due.

(d) Within thirty (30) calendar days of receipt of the grievance, the City Manager shall request that the Civil Service Board convene a hearing within thirty (30) days of the request to review the grievance.

It shall be the duty of the Civil Service Board, after considering all facts of the grievance as presented to the Board at a hearing called for that purpose, to prepare findings of fact solely on the merits of the evidence presented, and recommend a disposition of the grievance to the City Manager.

The Civil Service Board shall present its findings to the City Manager, and the employee.

(e) The City Manager shall render a final decision based on the findings of the Civil Service Board and all other findings in the case.

Section 5. General.

(a) Prior to a response by the immediate supervisor or by the department head to an employee's grievance,

said response shall be reviewed with the Personnel Director.

(b) Employees who are required to participate in a grievance meeting or hearing during their scheduled working hours shall be compensated at their regular rate of pay; however, no payment shall be made for participation during the employee's non-work hours.

(c) Employees who fail to process grievances in conformance with the time limits set forth above shall be deemed to have abandoned their grievance.

(d) Employees may represent themselves at all grievance meetings and hearings. In the presentation of a grievance, employees may be accompanied by a fellow employee. At any level of a grievance proceeding, the employee may elect to have a representative present the employee's position.

(e) There shall be no reprisals against any employee for participation in this grievance procedure.

* * *

EMPLOYEE
HANDBOOK
CITY OF
BOCA RATON

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as amended by:

Ordinance No. 2662, adopted August 28, 1979
Ordinance No. 2986, adopted September 8, 1981
Ordinance No. 3508, adopted March 25, 1986
Ordinance No. 3666, adopted November 24, 1987
Ordinance No. 3671, adopted January 12, 1988
Ordinance No. 3886, adopted November 13, 1990
Ordinance No. 3887, adopted November 13, 1990
Ordinance No. 3918, adopted April 9, 1991
Ordinance No. 3944, adopted July 9, 1991

First Printing	February	1979
Second Printing	February	1981
Third Printing	June	1984
Revised	May	1986
Revised	January	1988
Revised	July	1991

* * *

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* * *

ARTICLE 15

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* * *

City of Boca Raton

_____(SEAL)

CITY HALL • 201 WEST PALMETTO PARK ROAD • BOCA RATON, FLORIDA 33432 •
PHONE: (305) 393-7700

March 4, 1986

Hand Deliver – March 4, 1986

John C. Calhoun
Marine Safety Lieutenant
Parks & Recreation Department

Re: Letter of Reprimand

Dear Lt. Calhoun:

On February 27, 1986 at approximately 8:55 a.m., you were observed pulling your bathing suit down at the morning meeting and exposing yourself in a manner described as a "mooning" action. Several lifeguards including a female member of the staff were present and observed this conduct.

Article 7 of the Personnel Rules and Regulations provide for disciplinary action when an employee:

> "(4) Has been guilty of conduct unbecoming an employee of the City of Boca Raton."

City employees have a right to work in an environment that is untainted by such wanton departures from common decency. Your conduct was wholly inappropriate for an employee, and even more unacceptable for a supervisor. You are, hereby, reprimanded for that misconduct and instructed not to engage in it or related behavior again. Further misconduct by you will result in more severe disciplinary action up to and including dismissal.

If you disagree with this action, you may grieve either through the Personnel Rules and Regulations – Article 15 or the I.B.F.O. collective bargaining agreement – Article 13.

Sincerely,

/s/ James A. Rutherford
James A. Rutherford
City Manager

JAR/mkl

cc: Personnel Department/File
Parks & Recreation Department/File
I.B.F.O. Local 1227 AFL-CIO

TO: MR. RICHARD BENDER, PERSONNEL DIRECTOR

FROM: MR. PAT MC GOWAN, MARINE SAFETY CAPTAIN
P & R DEPT/MARINE SAFETY DIVISION – RED REEF SECTION

SUBJECT: MARINE SAFETY LT. JOHN C. CALHOUN (611-646-1240)

REFERENCE: INCIDENT 2/27/86 – MARINE SAFETY HEADQUARTERS 8:50 A.M. – 8:55 A.M.

STATEMENT

On the morning of February 27, 1986, at approximately 8:50-8:55 a.m., I was finishing with our morning meeting and I noticed Lt. John Calhoun pull his bathing suit down and bend over. At first I thought this was directed at me, but regardless, this was a clear case of exposing himself with the rest of the patrol present. This entails from six to eight lifeguards, one of whom is female. I asked her how she felt and she responded that she was shocked. I advised her that I would try to do something about the situation and I would contact my supervisor Marine Safety Chief, Bill Terry.

WITNESSES: OLG Carol LaRue
OLG Steven Griffith
OLG Brendan McCarthy

I will be speaking with the other employees who were present and see if they are willing to come forward.

Lt. Calhoun was observed in a similar incident just two days prior, but not in the presence of a female employee.

I would like it clearly noted that this was not an accident but an intentional exposure.

I feel that this type of incident should be dealt with so as not to allow its repetition no matter who is present.

Our department and especially the image of the lifeguard would stand to harsh publicity and public discussion had any patron walked in at that particular time and I feel this is not a practice that should be allowed, no matter who is present.

/s/ Pat McGowan
MARINE SAFETY CAPTAIN
PAT MC GOWAN

Tuesday March 4, 1986

I contacted Marine Safety Headquarters shortly after 9:00 AM and requested John Calhoun pay me a visit in my office. John arrived at approximately 9:10 AM.

He asked what the problem was and I told him I was very concerned about his behavior of last week. He looked surprised and asked what he had done. I said I had some reports of his "mooning" his fellow workers in the guard room and his defense was that it was a 'joke'.

I told him that there were some who didn't consider his actions a joke and that they were shocked and offended, in particular the females. I asked him if he thought his actions, as a professional lifeguard and marine safety officer were appropriate, and I expressed concern regarding the loss of credibility among the guards he supervises on a daily basis, adding that I was disappointed in him.

He replied that he could see my point and apologized for offending anyone. He said he was not aware there were any females present and he assured me it would not happen again.

I told him I had referred the matter to the Personnel Director and was awaiting any action he felt was appropriate.

I thanked him for coming and in leaving he said "I guess I spent too much time in the Navy", whereby I replied that he had also spent a lot of years on the beach in Boca Raton.

From Lorraine Gardner

TO: MR. RICHARD BENDER
PERSONNEL DIRECTOR

FROM: MISS CAROL LA RUE
OCEAN LIFEGUARD

SUBJECT: JOHN C. CALHOUN

REFERENCE: INCIDENT 2/27/86 AT MARINE SAFETY HEADQUARTERS

On February 27, 1986 at approximately 8:55 p.m., I was standing at the guardroom doorway in the Marine Safety Headquarters building listening to Pat give the morning meeting announcements when John Calhoun "mooned" the majority of us in the locker room. It was something that mostly shocked me and something I don't want to see again.

/s/ Carol LaRue
CAROL LA RUE, OCEAN LIFEGUARD DATE

City of Boca Raton

(SEAL)

CITY HALL • 201 WEST PALMETTO PARK ROAD • BOCA RATON, FLORIDA 33432-3730 •
PHONE: (407) 393-7700

SUNCOM (407) 922-7700

December 2, 1988

Beth a. Faragher
Ocean Lifeguard/Marine Safety

Dear Beth:

You are cordially invited to attend a meeting with Thomas E. Alexander, Parks & Recreation Director, and staff; Amos Jackson, Parks Superintendent; Sandra Dioli, Recreation Superintendent; Christine Strasser, Golf Course Manager; Bruce Kauffman, City Librarian; Jeff Borick, Landscape Architect/Park Planner; and myself, Mickey A. Gomez, Deputy Parks & Recreation Director.

The meeting has been scheduled for Wednesday, December 14, 1988 at 8:15 a.m. and the duration will be approximately one hour, in the Multi-purpose Room at the Boca Raton City Library (200 N. W. 2nd Avenue). You are one of approximately 20 employees, from the Parks & Recreation Department, that will meet this month for the purpose of discussing the happenings within the department (and the City as appropriate). You are encouraged to ask questions regarding your division or areas of concern.

These meetings with the director and his staff will be held monthly, with the same purpose in mind, but with different employees invited each time. *Operation PRIDE* is

your program of employee to employee communications through all levels of management.

If for some reason you *CANNOT* attend the meeting, please call Georgia Pavlick at 393-7814. You will be invited again at a later date.

See you there,

/s/ Mickey A. Gomez

cc: Division Head
Section Head

City of Boca Raton

_____(SEAL)

CITY HALL • 201 WEST PALMETTO PARK ROAD
• BOCA RATON, FLORIDA 33432-3730 •
PHONE: (407) 393-7700

SUNCOM (407) 922-7700

July 8, 1988

Beth A. Faragher
Ocean Lifeguard/Marine Safety

Dear Beth:

You are cordially invited to attend a meeting with Thomas E. Alexander, Parks & Recreation Director, and staff; Amos Jackson, Parks Superintendent; Sandra Dioli, Recreation Superintendent; Christine Strasser, Golf Course Manager; Bruce Kauffman, City Librarian; Jeff Borick, Landscape Architect/Park Planner; and myself, Mickey A. Gomez, Deputy Parks & Recreation Director.

The meeting has been scheduled for Wednesday, December 14, 1988 at 8:15 a.m. and the duration will be approximately one hour at the Boca Raton Community Center. You are one of approximately 20 employees, from the Parks & Recreation Department, that will meet this month for the purpose of discussing the happenings within the department (and the City as appropriate). You are encouraged to ask questions regarding your division or areas of concern.

These meetings with the director and his staff will be held monthly, with the same purpose in mind, but with different employees invited each time. Operation PRIDE

is your program of employee to employee communications through all levels of management.

If for some reason you *CANNOT* attend the meeting, please call Georgia Pavlick at 393-7814.

See you there,

/s/ Mickey A. Gomez

cc: Division Head
Section Head

July 25, 1986

Bill Terry –

Hello – how are things going down at the beach? I've been having a busy but fun summer.

I'm looking forward to returning to Florida and to guarding at the beach as long as my position is still open.

As of now, I will back in Boca Raton right about the 18th of August to register for classes. I will be able to start work again Friday August 29th so I will have time to get settled back in. If I am able to start sooner I will notify you and Janice as soon as possible.

Hope everything is going well for you and everyone else.

Please give my regards to the others.

Thanks for everything –

/s/ Beth Faragher

Beth Faragher
3939 N.E. 5th Avenue
Boca Raton, Florida 33432

CITY OF BOCA RATON
Marine Safety Division
80 S. A1A (Ocean Blvd.)
Boca Raton, Florida 33432

Attention: Mr. Bill Terry
Marine Safety Chief

Subject: RESIGNATION

Dear Bill:

I respectfully submit this as my letter of resignation effective

In order to persue a family commitment up north, I will be away for the summer. I will be returning to school at FAU in the fall and hope that I might return to work for the summer on the beach.

It's been good working here and I appreciate your consideration in this regard.

Very truly yours,

/s/ Beth Faragher
Beth Faragher

BF:jc

P.S. I have locked my uniform and all issued equipment in my locker. Should the need arise, I hereby give you my permission to remove the lock for access and use of same.

My address up north is:

Beth Faragher
446 Richmond Park E. #228A
Richmond Hgts, Ohio 44143
PHONE: (216) 461-9291
Combination: 28-14-32

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

November 14, 1997

William Robert Amlong, Esq.
Amlong & Amlong, P.A.
500 Northeast Fourth Street
Fort Lauderdale, FL 33301

Re: 97-282 - Beth Ann Faragher v. City of Boca Raton

Dear Mr. Amlong:

The Court today entered the following order in the above stated case:

> "The petition for writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 29, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel or or before 3 p.m., Wednesday, January 28, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 18, 1998. Rule 29.2 does not apply."

Enclosed are Memoranda describing the procedures

under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Please note that request for extension of time to file briefs on the merits will not be entertained as this case will be argued in the March Session. The deferred appendix method may not be used.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/_____
Sandy Nelsen
Merits Clerk
(202) 479-3032

Enclosures